

SYMPOSIUM

GLOBAL INVESTOR PROTECTION: SECURITIES LAW ENFORCEMENT AROUND THE WORLD[†]

WELCOME AND INTRODUCTORY REMARKS

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[†] The symposium was held at Fordham University School of Law on October 18, 2019. The transcript has been edited to remove minor cadences of speech that appear awkward in writing and to provide sources and references to other explanatory materials in respect to certain statements made by the speakers.

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PANEL 1**Moderator***Martin Gelter*ⁱⁱ

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ⁱⁱ An expert in comparative corporate law and governance, Professor Martin Gelter joined Fordham Law in 2009. Previously, he was an assistant professor at the WU Vienna University of Economics, a Considine Fellow in Law and Economics at Harvard Law School, a Visiting Fellow at the University of Bologna, and a Visiting Professor at the University of Paris-II (2013) and at National Taiwan University (2018). He has been a research member of the European Corporate Governance Institute since 2006. Martin holds degrees in law from the University of Vienna, in business administration from WU Vienna University of Economics, an S.J.D. from Harvard Law School, and an M.A. in Quantitative Methods for the Social Sciences from Columbia University. His scholarship has appeared in journals and books in Europe and in the U.S., and he is a co-editor of the 2019 book “Global Securities Litigation and Enforcement” (Cambridge University Press).

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PANEL 2

Moderator

Pierre-Henri Conac^{vi}

Professor of Commercial and Company Law, University of Luxembourg

Fox's belief that law is significantly informed by the social sciences led him to pursue a Ph.D. in economics at Yale University in 1980 to more deeply understand his chosen field. Professor Fox practiced law with the New York City firm of Cleary, Gottlieb, Steen & Hamilton and taught at Yale University, Fordham Law School, and Indiana University Law School in Bloomington. He served as a University of Michigan Law School faculty member from 1988 to 2003. He is a member of the Council on Foreign Relations and past chair of the business association's section of the American Law School's Association. In addition to earning a Ph.D. at Yale, Professor Fox also has a J.D. from Yale Law School and is a graduate of Yale College.

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^{vi} Pierre-Henri Conac is Professor of Commercial and Company Law at the University of Luxembourg. He is the author of "The regulation of securities markets by the French Commission des opérations de bourse (COB) and the US Securities and Exchange Commission (SEC)" which was awarded several prizes. He has written numerous articles on corporate, securities and comparative law and co-edited several books with national and international publishers. He has been involved in policy making in company law, banking and financial law at the European Union level and at the national level. Especially, he has been member of several working groups in these areas. From 2011 to 2016 the Board of Supervisors of the European Securities and Markets Authority (ESMA), appointed him twice to its consultative Securities and Markets Stakeholder Group (MSG). Pierre-Henri Conac is also managing editor of the *Revue des Sociétés* (Dalloz), France's oldest corporate law review, and co-chief managing editor of the *European Company and Financial Law Review* (ECFR, de Gruyter).

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^{viii} Jill E. Fisch is the Saul A. Fox Distinguished Professor of Business Law and co-director of the Institute for Law and Economics at the University of Pennsylvania Law School where she teaches and writes on corporate law, corporate governance and securities regulation. Prior to joining Penn, Professor Fisch was the T.J. Maloney Professor of Business Law at Fordham Law School and Founding Director of the Fordham Corporate Law Center. Professor Fisch is an associate reporter for the American Law Institute's Restatement of Corporate Governance, a director of the European Corporate Governance Institute and a member of the National Adjudicatory Council of the Financial Industry Regulatory Authority. Before she entered academia, she practiced law as a trial attorney with the United States Department of Justice, Criminal Division, and as an associate at the law firm of Cleary, Gottlieb, Steen & Hamilton. She received her B.A. from Cornell University and her J.D. from Yale Law School.

^{ix} Yuliya Guseva is a Professor of Law at Rutgers Law School. Her areas of expertise are securities market regulation, law and economics, and international business law. Guseva's scholarship includes articles and essays published or forthcoming in the Boston College Law Review (reprinted in the Securities Law Review), the Columbia Business Law Review, the Journal of Corporation Law, and other law reviews. As a member of the Rutgers Center for Corporate Law and Governance, Professor Guseva is the principal investigator in the project supported by the University Blockchain Research Initiative. Prior to joining Rutgers, Guseva was a Visiting Assistant Professor at Fordham Law School and a postdoctoral fellow in the Program in the Law and Economics of Capital Markets and a Kauffman Legal Research Fellow at Columbia Law School. Guseva graduated summa cum laude with an S.J.D. from Central European University and was a Stone scholar at Columbia Law School where she received her LL.M.

FIRESIDE CHAT*Elad Roisman^x*

Commissioner, U.S. Securities and Exchange Commission

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^x Elad L. Roisman was appointed by President Donald Trump to the U.S. Securities and Exchange Commission (SEC) and was sworn into office on September 11, 2018. Commissioner Roisman joined the SEC from the U.S. Senate Committee on Banking, Housing, and Urban Affairs, where he served as Chief Counsel. In that role, and as Securities Counsel on the Committee, he counseled Chairmen Mike Crapo (R-ID) and Richard Shelby (R-AL), as well as members of the Committee, on securities, financial regulation, and international financial matters. Commissioner Roisman worked on drafting several pieces of legislation that became law and played an integral role in the drafting and negotiation of the Economic Growth, Regulatory Relief, and Consumer Protection Act. Before working in the Senate, he served as Counsel to SEC Commissioner Daniel M. Gallagher, focusing on enforcement and policy relating to the U.S. equity and fixed income markets, the asset management industry, and international regulation of capital markets. Prior to joining the SEC, he held positions as a Chief Counsel at NYSE Euronext and an associate at the law firm of Milbank, Tweed, Hadley & McCloy LLP in New York. Commissioner Roisman earned his bachelor's degree in History at Cornell University and his J.D. at the Boston University School of Law.

^{xi} Sean Griffith is the T.J. Maloney Chair in Business Law at Fordham Law School in New York City. Professor Griffith is an expert in corporate and securities law and, in addition to Fordham, has taught at Columbia Law School, the University of Connecticut School of Law, New York University School of Law, and the University of Pennsylvania Law School. Professor Griffith received his law degree magna cum laude from the Harvard Law School, where he was an editor of the Harvard Law Review and a John M. Olin Fellow in Law and Economics. He received his undergraduate degree from Sarah Lawrence College. Prior to entering academia, Professor Griffith was an associate at the law firm of Wachtell, Lipton, Rosen & Katz in New York.

WELCOME AND INTRODUCTORY REMARKS

DEAN DILLER: Good afternoon, everyone. I am Matthew Diller. I am the Dean of Fordham Law School. Thank you all for coming. It is great to see you all here.

Today's topic is a great one—one that is of central importance to the fairness of our markets and their integrity. The Securities and Exchange Commission (SEC) and the U.S. system of protecting the integrity of capital markets have long been seen as the gold standard. But does that continue to be true? Are there other systems and models that are, in fact, better than what we do here in the United States? We, of course, are filled with flaws and shortcomings of our own.

We are so fortunate to have on our faculty Professor Martin Gelter, who has taken this topic by the horns and produced this fantastic tome, which you see on the coffee table, so you can view in one way this whole afternoon as an extended consideration of this topic that is so well dealt with in Professor Gelter's book by him and his co-authors.

I know it was many years in the making. It makes Thomas Mann's *THE MAGIC MOUNTAIN* look like a short story. But having said that, it deals with the subject in a comprehensive way that enables fantastic comparisons and analysis. This afternoon will give you a sense of the kind of discussion you can find in the full book, which I recommend to all of you.

I want to also thank Professors Gentile and Griffith for your support and leadership for the *Journal of Corporate & Financial Law*, and I want to welcome back Professor Jill Fisch, who was on our faculty for many years. Jill was the founding director of our Corporate Law Center. It is always great to have you back in our midst.

I just want to say a word about the *Journal* itself. The *Journal of Corporate & Financial Law* is one of the premier student-edited business law journals in the country. It is the single most-cited specialty journal in banking and finance and among the top ten specialty journals in corporations and associations. Its articles, essays, comments, and symposia are relied upon by academics, practitioners, executives, regulators, and judges to keep abreast of the latest developing issues and thought in corporate law and scholarship.

Our business law program, more generally, is one of the jewels of our law school. We have a rich and deep curriculum in business law subjects. By my last count, we have about one-hundred course titles in our curriculum. It is a great draw of students who come here because of

their interest in business law and whom our superb faculty support. It is a program of which we are very proud. The *Journal* is at the heart of it, along with our Corporate Law Center.

It is great to see you all here today. At this point, I hope you feel very welcomed and I wish you a great afternoon.

I would now like to thank and introduce Michael Bruno, our Symposium Editor. Thank you.

PANEL 1

PROF. GELTER: This is a very exciting moment for me, so thank you, Julian Constain and Mike Bruno especially, for setting up this wonderful conference. You have done a great job. I would also thank all of the panelists for agreeing to come here, and of course, all of our colleagues on the faculty who invested a lot of time to make this event happen.

The idea behind the topic for the Symposium was for us to revisit some of the themes in the book that I co-edited with Pierre-Henri Conac,¹ who will be chairing the next panel. The book covers securities law enforcement in twenty-nine countries at a high level of detail and discusses disclosure requirements, public enforcement by regulators, civil liability, and especially procedural aspects of litigation. It also touches upon cross-listings and enforcement against foreign issuers. Some of the panelists are authors in the book, in particular Eugenio Cardenas and Yuliya Guseva, who contributed chapters on Mexico and Russia respectively. As the author of the general overview chapter in the book, I tried to tie all of the themes together in a general chapter and put them into the context of current thinking about securities law. In the process, I learned a little bit about every country's law, but of course, I lack the in-depth knowledge of the authors of the country reports.

Today, the first panel will mainly focus on private enforcement and the second one more about public enforcement, but it is not a clear-cut distinction, so there is some overlap between the panels. Also, some of the speakers will talk about enforcement against foreign issuers in the United States. Thus, we will have a lot of dimensions of international securities law covered.

From the international perspective, it is a key question whether securities law should primarily be enforced privately through litigation, through a public regulator, or through a specific combination of both. On the one hand, lawyers and academics in many parts of the world closely follow the U.S. model of securities litigation. On the other hand, it does not always have the best reputation within the United States, among academics in particular, for various reasons.

First, there is the theory of circularity, which says that it is ultimately shareholders that fund payouts, either through loss of value of their stock

1. GLOBAL SECURITIES LITIGATION AND ENFORCEMENT (Pierre-Henri Conac & Martin Gelter eds., 2019).

(which inevitably follows a payout to plaintiffs) or through funding directors' and officers' (D&O) liability insurance.²

Second, many observers doubt that securities litigation creates a sufficient level of deterrence that sets strong incentives to keep corporate decisionmakers from wrongdoing, considering the cost of the litigation system.³

Third, there is a debate about litigation agency costs,⁴ meaning whether the enforcement mechanism, with lawyers that have high-powered incentives, actually gets the optimal results for investors, on which I think we will hear different perspectives today.

Internationally, there is debate about whether it should be regulators or private enforcement that does the heavy lifting. The empirical evidence in law and finance appears to favor regulation when we look, for instance, at the research that Howell Jackson and Mark Roe have done,⁵ which showed that public enforcement is probably a stronger driver of capital markets' development than private enforcement.

Unfortunately, in many countries there are practical limitations on regulation, limited resources of regulators, and limited legal powers.

Moreover, there is always the question of what political priorities regulators have. Are they truly independent? Are they as independent as the SEC? In some countries, questions such as corruption or political favoritism are a strong concern. In such cases, private enforcement could in principle, serve as a stopgap where regulation is ineffective or lacking.

When we look around the world, it is apparent that private enforcement does not work as well or is not as prevalent—depending on your perspective—in most countries as it does in the United States. From the book and other research, we can identify a number of factors that have made private enforcement a widely used mechanism in the United States.

2. See, e.g., John Coffee, *Reforming the Securities Class Action: An Essay on Deterrence and its Implementation*, 106 COLUM. L. REV. 1534, 1556–58 (2006); Merritt Fox, *Why civil liability for disclosure violations when issuers do not trade?* 2009 WIS. L. REV. 297.

3. See generally Urska Velikonja, *The Cost of Securities Fraud*, 54 WM. & MY. L. REV. 1887 (2013).

4. See, e.g., Jessica Erickson, *The Gatekeepers of Shareholder Litigation*, 70 OKLA. L. REV. 237, 238 (2017) (“Shareholder litigation, however, has agency costs of its own.”).

5. See generally, Howell E. Jackson & Mark J. Roe, *Public and Private Enforcement of Securities Laws: Resource-Based Evidence*, 93 J. FIN. ECON. 207 (2009); contra Rafael La Porta, Florencio Lopez-de-Silanes & Andrei Shleifer, *What Works in Securities Law?*, 61 J. FIN. 1 (2006).

These factors include the fraud-on-the-market theory in 10b-5 liability, which creates the presumption that because public information is reflected in the market price, investors do not normally have to show reliance on actual disclosures that a company made.⁶ Consequently, investors who bought or sold securities after false or misleading information was disclosed and before it was corrected are part of the plaintiff class, which creates a lot of bargaining power for the lawyers representing them.

Another key factor is the existence of the class action as such. In the United States, class actions are configured as an opt-out mechanism, which in fact, we do not see in this form in most other countries.⁷ In part because of that, there is an entrepreneurial plaintiffs' bar that takes a certain cut from litigation. In law school, of course, we like our graduates to be successful, so that is good from this perspective. More seriously, from a public policy perspective, it is clear that the incentives set by litigation costs are conducive to widespread litigation, particularly the "American rule" where every litigant pays their own costs, and the fact that attorneys typically only require payment if the case settles or if they win, thus turning the arrangement essentially into a contingency fee.⁸

Another issue is the question of discovery. If a suit proceeds to that stage, outside of the United States, plaintiffs do not have the ability of plaintiffs to access information from the defendant the way they do here. This severely limits the possibility for successful litigation.⁹

A key takeaway from the research on litigation found in the book is that deterrence is the key policy goal to make capital markets work. Compensation as such, which is often thought of a purpose of civil liability, can create powerful incentives that feed into enforcement and thus drive deterrence, but it should not be seen as a goal in itself, in part because of the circularity problem that distorts its effects.

Differences in substantive requirements to impose liability on the defendant do not appear to have a big impact, except where they have an

6. *Basic v. Levinson*, 485 U.S. 224 (1988); *see also* *Haliburton v. Erica P. John Fund*, 134 S. Ct. 2398 (2014).

7. *See* Martin Gelter, *General Report: Global Securities Litigation and Enforcement*, in *GLOBAL SECURITIES LITIGATION AND ENFORCEMENT*, *supra* note 1, at 3, 80–81 (contrasting opt-out with opt-in systems).

8. *See, e.g.*, Franklin A. Gevurtz, *United States: The Protection of Minority Investors and Compensation of Their Losses*, in *GLOBAL SECURITIES LITIGATION AND ENFORCEMENT*, *supra* note 1, at 109, 141.

9. Gelter, *supra* note 7, at 83.

impact on the burden of proof. The fraud-in-the-market theory is the key issue in point. In some countries, in fact, we are seeing a movement toward a fraud-on-the-market theory analog. In some jurisdictions, such as Canada, it was introduced as a conscious policy choice.¹⁰ The Chinese Supreme People's Court has issued a circular that leans into this direction as well.¹¹ There are some jurisdictions—including, for instance, Germany, Israel, and Taiwan—in which the courts and scholars analyzing decisions are actually saying that these countries are to some extent moving toward the fraud-on-the-market theory and making litigation easier from that perspective.

Another important question is really if the responsible individuals truly have skin in the game, i.e., whether they have are financially at risk from litigation. In some jurisdictions, you cannot even sue individual managers, e.g., in most cases in Germany. However, the reality is, even in the United States, they are not very often held personally liable because of D&O insurance.

Then, when you look at some jurisdictions, the question is also whether expertise of the courts and their workload allow for effective litigation. Think about, for instance, the case of India, which has a large number of publicly traded firms, but a court system strained by a huge case load.¹²

In any event, in many countries we are seeing interesting developments. In Europe, for example, we have strong resistance against collective litigation mechanisms that resemble those in United States. Policymakers and members of the legal community will often say that they do not want to be as litigious as the United States, which we could describe as cultural resistance, to a certain extent. But still, there has been increasing debate in recent years in various European Union member states, although we do not yet have securities litigation like in the United States across the board. Germany, for example, uses a model litigation

10. Stéphane Rosseau, *Canada: The Protection of Minority Investors and Compensation of Their Losses*, in GLOBAL SECURITIES LITIGATION AND ENFORCEMENT, *supra* note 1, at 170–71.

11. Robin Hui Huang, *China: Private Securities Litigation: Law and Practice*, in GLOBAL SECURITIES LITIGATION AND ENFORCEMENT, *supra* note 1, at 879, 888–90.

12. John Armour & Priya Lele, *Law, Finance, and Politics: The Case of India*, 43 L. & SOC. REV. 491, 508 (2009); *see also* Umakanth Varottil, *India: The Efficacy of India's Legal System as a Tool for Investor Protection*, in GLOBAL SECURITIES LITIGATION AND ENFORCEMENT, *supra* note 1, at 813, 838 (discussing the introduction of the National Company Law Tribunal as a specialized court).

mechanism, which is not working that well. The general impression is that it is not particularly effective and rather slow.¹³

The Netherlands now has a mechanism that is becoming quite popular, which has so far used a two-step mechanism involving a settlement with a representative organization. Last year, there was a change in the law this year which will make it look more like U.S. class actions.¹⁴ It is a very exciting country to explore in this respect, in part because the mechanism is sometimes used for international cases.

One other completely different mechanism we see in some jurisdictions is litigation by specialized entities, for example, in Taiwan. The government sets up an entity called “Securities and Futures Investors Protection Center.”¹⁵ It is basically a foundation allowing investors to initiate informal complaints. But they also have the right to bring securities class actions on behalf of investors and collect the proceeds if enough investors sign up. You might think of mechanisms like this one as semi-public mechanisms that are distinguished both from classical regulation and private, incentive-based mechanisms such as securities class actions in the United States.

I hope this gave you a good overview of the issue we are discussing in the book, as far private enforcement is concerned. I hope we will have interesting discussions over this afternoon, and I look forward to hearing from everyone else. As the moderator of this panel, I would like to continue with Professor Merritt Fox of Columbia Law School. Thank you so much for coming here. I know you just came in from a presentation in Chicago this morning, which is why all of us particularly appreciate your participation.

PROF. FOX: Thank you very much, Martin, for inviting me for what is obviously going to be a terrific afternoon conference on a very timely subject.

I think most of us know that the *Morrison*¹⁶ decision in 2010 was a landmark decision in the area of private securities litigation, so I want to

13. Dirk A. Verse, *Germany, Liability for Incorrect Capital Market Information*, in GLOBAL SECURITIES LITIGATION AND ENFORCEMENT, *supra* note 2, at 363, 406–07.

14. Loes Lennarts & Joti Roest, *Netherlands: Protection of Investors and the Compensation of their Losses*, in GLOBAL SECURITIES LITIGATION AND ENFORCEMENT, *supra* note 1, at 469, 506–11.

15. Wang-Ruu Tseng, *Taiwan: Investor Protection in Taiwan’s Capital Market*, in GLOBAL SECURITIES LITIGATION AND ENFORCEMENT, *supra* note 1, at 1025, 1052–53, 1055–57.

16. *Morrison v. Nat’l Austl. Bank Ltd.*, 561 U.S. 247 (2010).

talk about where fraud-on-the-market lawsuits are nine years after *Morrison*.

So, a little bit of background. Section 10(b) of the Securities Exchange Act of 1934 (the Exchange Act)¹⁷ is incredibly expansive in its potential reach. It prohibits any person “to use or employ in connection with the purchase or sale of a[ny] security ... any manipulative or deceptive device ... in contravention of” SEC rules. It does not really make any distinction between the United States and elsewhere in terms of the nationality of the issuer, the place of the transaction, or the residency of either the purchaser or the seller.

If you read it in its full, expansive language, it authorizes the SEC to promulgate rules that govern the whole world as long as there is some kind of connection with interstate commerce, which in our interconnected world is not very difficult to demonstrate. It does not seem likely that the SEC really is going to govern the world. So, what is reached? And in particular—at least for my interest—what is reached by fraud-on-the-market actions?

Before the *Morrison* case, it was governed by the “conduct and effects” test, which imposed liability if there was some kind of substantial conduct associated with the fraud or some kind of substantial effect in the United States. It was not at all easy to apply as a general matter and, in terms of the overall logic of fraud-on-the-market suits, it was particularly difficult to apply.

Along comes the Supreme Court in *Morrison*, which had never commented on the reach of Section 10(b) and Rule 10b-5.¹⁸ They had a very simple ruling. It would appear quite administrable. They said: “Use the holding of the case. Section 10(b) reaches the use of a manipulative or deceptive device or contrivance only in connection with the purchase or sale of a security on an American exchange, or the purchase or sale of any other security in the United States.”

What do we do with this? I am going to talk about how it has been applied in the lower courts and a little bit about my own views, in essence, for examples of issuers.

I want you to consider four large and established Japanese corporations, each of which is listed and thickly traded on the Tokyo Stock Exchange, with these different characteristics:

Corporation W lists its actual stock on the New York Stock Exchange (NYSE).

17. 5 U.S.C. § 78j(b) (2012).

18. 15 U.S.C. § 78j(b); 17 C.F.R. § 240.10b-5 (2009); *Morrison*, 561 U.S. at 273.

Corporation X lists American depository receipts instead on the NYSE. That is a security issued by a depository bank, most frequently the Bank of New York. The purchaser of it, in essence, is a beneficiary. The trust holds the securities, but you can buy and sell these. It is just like buying and selling the security because anytime you want to get the actual security, you can get that. Anytime somebody has one of these securities, they can create an American depository receipt (ADR), and arbitrageurs use those to trade back and forth with the principal exchange—in this case in Tokyo—to keep prices pretty much in line.

Then, consider Corporation Y. It has what are called “sponsored ADRs” on the over-the-counter market (the OTCQX), which is not an exchange, but a way that dealers communicate with each other and make firm quotes. The idea of a sponsored ADR is that Corporation Y went and asked the Bank of New York or whichever to set this up, to encourage this kind of transaction.

Finally, Corporation Z has an unsponsored ADR on that same dealer market.

Across these four issuers, we could imagine sixteen possible transactions, depending on which trading venue is employed and the residency of the purchaser. One factor we have among the sixteen transactions, at least in the way the law has developed, is that residency does not seem to matter very much. It seems like everything is built around either where something is listed for trading or the location of an actual transaction.

Let us start with Corporation W. It is a foreign company, but it lists its actual shares on the NYSE. Actually, I am not aware that any Japanese companies do that, but most Israeli and Canadian companies and a few very large European companies do that, and it makes their stock a little bit more liquid because it is more convenient to shift back and forth between the two markets.

One question, then, is: What about somebody who purchases on the NYSE, whether they are a U.S. citizen or foreign? That is pretty easy, right?

Let us go back to the holding. That is a purchase or sale of a security on an American stock exchange—pretty clear; not much contest there.

Now let us consider a purchase on the Tokyo Stock Exchange. If we just look at the holding of *Morrison*, which has, in essence, two prongs: it covers the purchase or sale of the security on an American exchange or the purchase or sale of any other security in the United States.

If you exclude the Tokyo Exchange under a theory that it does not satisfy this prong, you look at this and say, “Why would you ever need this prong if you are going to require that the transaction be in the United States? You would just have that.”

However, that is not in fact, how the courts have read it. I do not believe any district court or circuit has in fact paid attention to the strict holding. The Second Circuit in the *City of Pontiac* case involving UBS,¹⁹ which is one of those European companies that is listed on the NYSE, refused to follow the holding and said instead that allowing purchasers on a foreign exchange to sue under a fraud-on-the-market theory was “irreconcilable with *Morrison* read as a whole.” So, if you are looking for cases where you are supposed to ignore the holding, this is a good one.

Now, let us think about Corporation X that lists its ADRs on the NYSE. Again, there is not really any question that the purchase of these ADRs on the NYSE would be covered. It is a security; it is a security of the Corporation X, and it trades on an American exchange.

What about the purchase of stock in Tokyo? Well, now we really have a difference because the security that is trading on the NYSE is a different security—it is an ADR—from the security traded in Tokyo, and that is the way the courts have interpreted, without too much trouble, *Morrison*.

What about Corporation Y that has sponsored ADRs on the OTCQX exchange? This one would appear to fit very neatly into the second prong. It is a security; it is an ADR, which is a security that has been recognized in cases where ADRs are trading on the NYSE.

But if you look at district court cases in the Southern District of New York (S.D.N.Y.), where this issue has come up most frequently, they all say, starting with the *Société Générale* case back in 2010,²⁰ that the security is a “predominantly foreign securities transaction” and therefore there is no cause of action. That really makes no sense at all, because if an ADR transaction on the NYSE is not a predominantly foreign exchange, it is unclear why a transaction in a dealer market suddenly is predominantly a foreign transaction.

Finally, let us consider Corporation Z, which has an unsponsored ADR. That is where, let us say, the Bank of New York thinks: We make a little money. We make fees from creating these ADRs, and we charge a

19. *City of Pontiac Policemen’s & Firemen’s Ret. Sys. v. UBS AG*, 752 F.3d 173, 180 (2d Cir. 2014).

20. *In re Societe Generale Sec. Litig.*, No. 18 Civ. 2495 (RMB), 2010 U.S. Dist. LEXIS 107719, at *14 (S.D.N.Y. Sept. 29, 2010).

little service fee when you put stocks in or take stocks out of them, and so on. It is worth doing, even if Corporation Z has not asked us to do it. What about that?

Interestingly, the Ninth Circuit has a case like that, the *Toshiba* case, which was decided in 2018.²¹ They reversed a district court ruling that, in essence, followed the S.D.N.Y. approach, saying this is predominantly a foreign transaction, and they effectively said, “No, it clearly does look like it fits into the second prong.”

What they then went on to do was to send it back to the district court to figure out whether the misstatements that were made by Toshiba were “in connection with the purchase or sale of any security.” I do not quite see how that is distinguishable when a statement is made by a foreign issuer and instead the transaction occurs on a U.S. exchange, but that is the inquiry. That is where that litigation stands now.

I will suggest conceivably a couple of approaches for dealing with these kinds of questions and close it at that.

For these unsponsored ADRs that trade on the over-the-counter market and therefore not on an exchange, I would suggest if the company has done nothing to promote trading in the United States, then there should be some serious international law jurisdictions to prescribe questions about whether U.S. law really could reach and prohibit those misstatements.

If it is not a Section 10(b) or Rule 10b-5 violation in the first place because we are trying to impose our laws on a company that has done nothing to promote trading in the United States—if that international law argument is correct, then the normal canon of statutory construction would say, “In case of any ambiguity you would interpret Section 10(b) as to not reach that issue. Certainly, *Morrison* does not tell us that we must do so.”

The other possibility is just to say these over-the-counter markets are not very efficient markets and a fraud-on-the-market suit requires market efficiency. The problem with that is as long as there is good arbitrage going back and forth, even if there is not a lot of activity on the over-the-counter market, usually the price there is very close to the price on the home exchange.

I will leave it there. Thank you.

We will move on to Geoffrey Jarvis. Glad to have you here.

21. *Stoyas v. Toshiba Corp.*, 896 F.3d 933, 952 (9th Cir. 2018).

MR. JARVIS: Thank you all for having me. I appreciate the opportunity.

I am going to talk to you about some of the topics that Professor Gelter was talking about—why we do securities litigation against companies—and maybe some of the ways it is done in Europe, which is my area of specialty, a little bit of Japan, and some of the British Commonwealth as well. The reason I am actually here and have been invited to talk to you is because of Professor Fox’s topic, which is the *Morrison* decision.

I am a U.S. domestic securities litigator on the plaintiff side and only got into international litigation at all because *Morrison* basically said, “All that stuff you are doing in the United States, nope. Take it overseas.”

We represented a lot of U.S. institutional investors, and they were cut out of securities litigation with respect to their European holdings, so they would come to us and say, “What can you do?” We got into the business of funding litigation in Europe. I have done quite a bit of that over the last decade or so, including some of the biggest cases that have ever been decided in Europe.

What I am really here to talk to you about is in the context of securities litigation—and I speak as a plaintiffs’ lawyer, so my prejudices are clear—why do we do it, what are the benefits that we hope to achieve from securities litigation, and then maybe talk a little bit about how some of that applies in the European context.

Why do we do securities litigation? Professor Gelter touched on three of the traditional rationales:

(1) We do it to compensate investors who have been harmed as the result of fraudulent statements and/or other activities by an issuer of securities;

(2) We do it because we think it might be deterring—I am talking about private enforcement here—future bad conduct; and

(3) We do it because we want better-functioning capital markets, which is not as much talked about. We want to encourage companies to disclose as much about their businesses as possible so investors can be fully informed.

The question then becomes: Are these particular objectives in any way achieved through private securities litigation as opposed to governmental enforcement? I speak as a U.S. lawyer, and I will talk a bit about how the European system, in general, deals with that.

Let us start with compensation. I think most people would say, “It is obvious. You lost money. They lied to you. The stock went down. You should get paid for it.” Right? Pretty obvious.

Except—and this is what Professor Gelter was referring to—who pays for it? There is an argument of circularity. It is the current shareholders who are paying for the shareholders who bought during the period when it was defrauded, so all you are doing is moving money around pockets of shareholders. Some academics might argue that the costs of paying for people like me is too great a cost to do that.

I would argue, first, as to compensation, in some theoretical sense, that is true. In the real, more practical world, that is not so true and there is another reason to do compensation. So, let us talk about the practical.

Certainly, in the United States—and to a lesser extent in Europe because the cases tend to be a bit bigger—most settlements are not that big in securities cases. They tend to run on average somewhere between \$10–20 million, which sounds like a lot of money, but virtually all major issuers of securities having a lot of securities traded on exchange have directors' and officers' liability insurance and most of them have considerably more than \$20 million. Maybe some of the smaller ones do not, but by and large, they can run into the hundreds of millions of dollars.

So, who is really paying for the securities? It is the insurance. You could say they pay for their insurance premiums, but that spreads across the market. It does not really move from this group of shareholders of the company to that group. It is more of a market-type thing.

So, the argument that securities litigation is circular in practical terms is not correct, in most cases it is not. In a mega-case many years ago—for example, I was involved in a case against Tyco that ultimately settled for \$3.25 billion—there was an argument made by the defense lawyers: “Judge, do not even certify this class. It is totally circular. Current shareholders are going to be paying for the prior ones.” The judge rejected it, and the case settled.

But, putting aside the money, the idea that, “Okay, you are going to get paid”—as the cartoon that Professor Gelter put up, “This is my retirement plan”—there is a more philosophical and interesting reason why I think you want to have compensation. The idea that you have a system where you, the big or small investor, can be harmed—“I can lie to you; I can take your money, and you cannot do anything about it. You cannot go to a lawsuit; you cannot do anything; unless some government enforcer says you can do it, you cannot do it.” There is a certain aspect that I think creates less belief, if you will, in the sanctity of the market. It is the idea that you have no recourse, that you are essentially powerless to resist the people in charge. You give them your money, and if they decide to take it, “Oh, well.”

The idea that we have a strong enforcement mechanism in the United States, I believe, strongly supports the idea that people are willing to invest their life savings in the securities markets—as you have sometimes heard on the radio, the “Wall Street casino”—but it has its ups and its downs; it does more up than down over a long period of time. That is an important aspect, the idea that you have to have belief on the part of investors in order to get them to invest, that they will be treated fairly. Self-redress, I think, is a strong component of why U.S. capital markets are among the best in the world. People believe that if they “get screwed,” if you will, they have some redress.

Let us go to the second one, deterrence. Does this private enforcement mechanism deter bad behavior? Let us be clear. I am a private lawyer, so you would say, “Yeah, you are going to be a big deterrence guy.” The answer is “not really.” In my experience, what really deters issuers or corporate executives from doing bad things is the idea that someone is going to throw them in the slammer.

There is nothing that focuses the mind on bad behavior like the idea that you are about to spend twenty-five years in Upstate Correctional Facility in New York, which a guy named L. Dennis Kozlowski, who was the Chairman of Tyco Corporation, was sentenced to. I assure you that the fact that the CEO of one America’s largest corporations was sentenced to twenty-five years in jail has far more deterrent effect on his fellow CEOs from committing fraud than anything that I am going to do. There are no doubts about that.

My friends at the SEC will be speaking later, and when company executives go through the Enforcement Division, the SEC can ban a man or a woman from being an officer of a public company for life and potentially throw them in jail—that has far more deterrent effect.

But let us look at the great financial crisis of 2009, the second largest financial crisis probably in the last hundred years, really caused by bad fraud in the mortgage business. Exactly how many U.S. executives went to jail as a result of the 2009 financial crisis? The answer would be zero. I think there was one guy peripherally involved who got some jail time, but it was more, I think, for insider trading than anything else.

Public enforcement methods simply did not work. There may have been a few officers who were banned. I am not aware of any offhand. I am not going to say there were not any, but not very many.

The reality of it has been that virtually all of the enforcement conducted against the big investment banks, mortgage banks, and everybody else, was through private lawsuits. To the extent that they paid at all, they paid because my colleagues and I sued them and ultimately

recovered many billions of dollars across dozens of defendants and literally hundreds of lawsuits.

While I would argue that public enforcement is great when you can get it—as Professor Gelter alluded to—first, there is sometimes a lack of capacity; they simply do not have the money to go after these extremely well-heeled defendants and their legions of lawyers.

Second, there is also a lack of political will. People donate to political campaigns. You cannot always be sure—even in the United States, which is probably about as clean as any of the systems out there—that there is the political will to go after these people.

In the absence of the best solution, we do what we can do. You all have heard of the theory of the second-best: “The best is the enemy of the good. If you try for the ultimately perfect system, you end up with nothing instead of maybe a good system.” I would argue that, frankly, at least it is a good system that you have private enforcement go after these people.

Third, what does it do to capital markets? Does private litigation actually promote more disclosure, if you will, by companies? The answer—at least in some circles—is yes.

There are two papers that I could refer you to, one by a professor named Anywhere Sikochi. He is an assistant professor at Harvard Business School, and he wrote a paper in the aftermath of *National Australia Bank* looking at people who had been subject to U.S. securities regulations and who were not.²² He had measures for how you would look at their disclosure, and he decided that actually the existence of a private enforcement mechanism in the U.S. improved disclosure.

The second paper was written by Iván Marinovic at Stanford and Felipe Varas at Duke, who applied game theory analysis to the idea of disclosure.²³ They also came to the conclusion that the existence of a private enforcement mechanism actually improved the corporate disclosure environment in the United States. This, of course, provides more information to investors, allows for more informed decisions, and is generally better for the markets.

22. See generally, Anywhere Sikochi, *The Effect of Shareholder Litigation Risk on the Information Environment: The Case of Cross-Listed Firms*, (Harv. Bus. Sch., Working Paper No. 17-048, 2016), <https://www.hbs.edu/faculty/Pages/item.aspx?num=52015> [<https://perma.cc/7FAA-VEYU>].

23. See generally, Iván Marinovic & Felipe Varas, *No News is Good News: Voluntary Disclosure in the Face of Litigation*, 47 RAND J. OF ECON. 822 (2016).

As you might gather, as a plaintiffs' lawyer, I would suggest that private enforcement has valuable societal benefits. I speak in large part for that in the United States.

How is this going in Europe? Many European jurisdictions do a fairly reasonable job, under certain limited circumstances, of allowing shareholders to prosecute actions against fraudulent companies. But the number of cases that can be brought, the number of frauds that can be effectively redressed, and the class of shareholders who can effectively undertake that redress are far more limited than in the United States almost across the board.

Is it a substantive problem? Do they not have the laws? Is fraud not illegal? No. Fraud law looks pretty much the same in most developed economies. It started primarily from the British model I suspect. That is where the United States stole it from. Everybody has laws. If you lie in the issuance of securities, you are liable. The devil, as they say, is in the details.

Even in Japan, which Professor Fox alluded to, I have a number of cases. The courts are pretty good for securities in Japan, and our Japanese lawyers are forever asking us to write them tomes on damages law or scienter law in the United States because they will use it in the local courts. Why? Because those concepts are used and they are much more developed on a judicial level here than they are anywhere else, so they at least appear. They do not necessarily have to follow them, but they at least look. So, substantively it is not a problem.

Procedurally, on the other hand, I would argue most places are, from an investor protection perspective, a train wreck. There are three areas—and Professor Gelter alluded to two of them—which are discovery and mass actions.

Let us start with why discovery is even relevant as to whether you can pursue a fraud case in a foreign country. The answer is frauds are, by their nature, concealed. That is the idea. So, there is generally not that much in the public. You might get hints that the stock prices of a company collapsed and some funny stuff is out there, but is that enough to support a securities case for the high standard required for fraud—without some kind of ability to get in behind the curtain? The answer is in most cases there is just no ability.

So, what happens in most European countries—and Japan and other places—is that, first, cases are brought where there has been a huge public exposé, lots of news articles, things like that. A recent case would be a company out of South Africa, which is now a Dutch company called Steinhoff. It lost 90 percent of its value in a single day. Lots of articles

have come out in the press; there have been investigations; enough information is out there. There are currently a number of securities cases pending either in Germany or the Netherlands. The company is on the brink of bankruptcy, but nonetheless, fraud cases were feasible in that particular circumstance.

Another one would be the diesel fraud at Volkswagen. I believe Volkswagen's securities lost €50–€60 billion as a result of the diesel fraud. So, there are substantial securities cases pending in Germany. There has been so much information that has come out of the United States and everywhere else. It is a viable case.

Most cases are not. For most frauds, there is a hint of something out there and it never comes out. If you cannot get behind the curtain, cases do not happen. So, most fraud goes unprosecuted in Europe. The public prosecutors try, but again, have limited resources, so it is easier to get away with it.

Second, class actions. If you are a big investor—you are a pension fund, mutual fund, or whatever—you have the money and the involvement in a particular stock, you can go pursue your own lawsuit. But if you are a smaller investor, without some kind of a mass action—be it a class action or the ability to sign on to something—you cannot get redress. Even if you have a \$100,000 loss in a stock, litigation is hideously expensive.

I was involved in a case against the Royal Bank of Scotland (RBS), which involved just a single public offering by the RBS. At the time the case settled, the defense costs of that case had exceeded £150 million, plaintiffs' costs being maybe £90 million. With \$100,000, you cannot do that sort of thing, and most cases are equally difficult. The big guys can play. If you want the little guy, you have to be able to get them together.

There are no class actions, pretty much, in Europe, and mass actions are hard to put together. So you tend not to have small investor protection in Europe, Japan, or any of the other places where you could do it. You do in the United States, obviously; you do in Australia; you do in Canada, which allow class actions. But, basically, it is a rich person's game in Europe and most of the rest of the world.

Let us talk about what is actually out there in Europe, starting with discovery. Discovery really does not exist outside of the United Kingdom. The United Kingdom allows for what we would call "document discovery." They call it "disclosure"; you can produce documents. The idea of a deposition never occurred to them, and they would not allow it, but you can get a lot of documents. So, it is possible to pursue cases in the

United Kingdom; hence the *RBS* case,²⁴ in which I was involved—not with a smaller group but with one of the larger groups of investors—and that works.

Outside of that, the cases that have been brought in which I have been involved—cases against companies like Fortis, Volkswagen, Steinhoff, and others—have all been cases where there were big public disclosures, either newspaper articles or something else, and that is just it. There may be some smaller ones, but there are not that many. Discovery is important because it allows you to prosecute more of what is otherwise hidden.

Mass actions are even, I would argue, less prevalent. The United Kingdom does allow for what we would call a class action, similar to a U.S. class action, but only in what they call competition cases—antitrust to us—not in securities or anything like that.

The Netherlands has allowed for many years a proceeding under the Dutch Act on the Collective Settlement of Mass Claims (WCAM)²⁵ where you can settle a case. In other words, if the defendant has decided, “We are going to get hit with enough big guys we want to roll up what we call the ‘tail risk’”—in other words, “We want all litigation to be done”—they can go to the Dutch court and settle the case in what they call an “opt-out class action,” which means everybody is in unless they affirmatively get out.

That is great when the defendant wants to settle, but mostly they do not want to do that. I was involved in one where Shell paid an estimated \$550 million and we settled it through WCAM in Amsterdam. There have been a few others, but not many.

For example, Volkswagen could do that. They are not going to do that, I assure you. People have tried. They are not going to do it. They are just going to take whoever sues them and wait for the statute of limitations to run out and do the tail risk that way.

There is the new Dutch law, but it has some statute of limitations on jurisdiction as to who can actually bring a case, and it is only against Dutch companies. There are a few big ones, but it is not going to be, I think, a universal mechanism for class actions in Europe.

One final point I will deal with, which is near and dear to my heart: How do you pay for these things on behalf of investors? The big guys

24. The RBS Rights Issue Litigation, [2016] EWHC 3161 (Ch) (Eng.).

25. The codification of WCAM is found in article 7:907 et seq of the Dutch Civil Code (DCC) and article 1013 et seq of the Dutch Code on Civil Proceedings (DCCP). See Art. 7:907 et seq. BW (Neth.).

obviously could pay for their own, or hire a litigation funder, or something. And in many countries, certainly in the United Kingdom and Europe, you can get litigation funding, but you cannot get contingent fees.

Yes, you can in England. A recent development, something called the “Jackson reforms” came in 2013,²⁶ although there are very few lawyers in London who are really willing to do contingency work as an American lawyer would. You can get funding sometimes. We do it. That is what my firm does, in part. Mostly, we litigate in the United States, but we use some of the funds that we earn here to fund these cases in Europe. But funders are hard to convince to bring these cases.

A better model, I think, would be if you had contingent fees for local lawyers, who know the system, the cases, and the companies and who could actually bring a case. That is very rare in most countries in Europe. Outside of the United States, Britain, and Canada, it is not that widespread. There are a few others.

Then, there are some countries which are primarily formerly British Commonwealth—places like the Caymans, Hong Kong, Singapore, and others—where you cannot fund and you cannot contingent. If you are in those countries, unless you are rich, you are kind of screwed. That is just the way it is. In fact, in Hong Kong you can go to jail for engaging in litigation funding, except in a bankruptcy context. In Singapore, it is the same: they actually throw you in jail.

On that, I will leave it to our final colleague, who is going to discuss Latin America. Thank you.

PROF. GELTER: Our next speaker is Eugenio Cárdenas of Kirkland & Ellis LLP, who wrote the chapter on Mexico in the book and also has a broad knowledge of Latin America.

Eugenio, it is up to you.

MR. CÁRDENAS: Thank you so much. Thank you for the invite. I am very grateful to be here. Thank you to Professor Martin Gelter and Professor Pierre-Henri Conac for inviting me to contribute to the book. I was responsible for writing the chapter on Mexico.

The main question that we tried to address with the book was the extent to which investors are actually protected in today’s global capital markets. It is a big empirical question, but I think we provide some insight through the different jurisdictions that we analyzed.

26. See, e.g., C.P.R. 2013, § 44.18 (Eng.); Damages Based Agreements Regulations 2013 (Eng.).

In my case, Mexico really is an example of the larger Latin American region and emerging markets in general, and I would like to provide you with an overview of our findings.

Our focus was on Mexico's new securities enforcement system, specifically looking at disclosure-related victims and their losses and the extent to which they have access to compensation and redress.

The method was mainly a survey, I think a very complete survey, designed by Professors Gelter and Conac. It was aimed at understanding the different institutional designs and frameworks, but also it had an empirical aspect in terms of the actual implementation—enforcement actions, sanctions, settlements, budgets, staffing, etc.—across jurisdictions.

The challenge with these emerging jurisdictions is the fact that there is a strong case against enforcement in these jurisdictions. The default would be an absence of enforcement, for many of the reasons that the other panelists have explained already.

To give you the lay of the land—which maybe is more like a “no man's land”—you will find an absence of minority rights, private benefits of control extraction, concentrated ownership structures, family-owned firms, and a situation where shareholders are having to rely on directors and officers who supposedly have access to the information because they have hands-on control running the business, rather than on the regulator or the enforcement mechanisms.

Again, other perspectives to understand this context include illiquid markets; inefficient markets, where information will not really reveal misconduct; smaller markets with few investment opportunities, where investors will ultimately be cornered to invest in wrongdoer firms.

Of course, in connection to what was mentioned, there is an assumption of mismanagement, discounting prices beforehand, and just in general an environment where you would not expect to find multiple enforcers and enforcement avenues—the “multiple-enforcers model” of developed markets—but rather just public enforcement, and really not even enforcement; more like a capital markets oversight or surveillance, which does not provide for a litigious entrepreneurial setting.

Again, why are we here? Because enforcement matters. At least in the last twenty to twenty-five years with globalization, it has become something that we have come to pay attention to. And there is widespread consensus—not consensus, but rather it is a fact—that economic programs, policymakers, and academics all have concluded that enforcement is a determinant and precondition to development.

There is a “race to the top,” as SEC Commissioner Elisse Walter mentioned a few years back at a summit meeting of regulators from all over the world, involving an international convergence of principles. Firms understand this clearly, and they cross-list to the United States with ADRs or otherwise signal subjection to higher enforcement—the “functional convergence” theory.

This would lead us to think that Mexico, a leading Latin American jurisdiction, would in recent years have adopted a more robust enforcement framework and heightened enforcement.

Maybe not surprisingly, but interestingly, the main finding that ties all this together is that, at least in terms of institutional design, Mexico’s new framework actually reveals a relatively unique design of a “multiple-enforcers model.” Finally, there is a framework that potentially will provide for an interplay of market supervision by the regulator, criminal justice, self-regulation by the industry, private rights of action, and international cooperation. We now have that.

I think this speaks to an interesting development, but the law in action will tell us otherwise. There are still gaps that have not been bridged, especially in terms of implementation. I conclude that neither separately nor jointly will these different enforcement channels be able to ultimately ensure direct compensation for disclosure-related losses.

Public enforcement by the regulator: There is a framework that now provides for an enhanced role of the securities regulator.²⁷ There is more discretion over setting penalties—imposing sanctions on account of losses—which I think is a great development, even though, as you will see, there is no direct compensation. Still, there are some incentives to reimburse victims as an attenuating or mitigating factor in connection with other penalties, and there is an enhanced scope of prohibitions and fines, etc.

But still, the toolkit that a regulator has is quite limited, so Mexico’s regulator is not yet an ex-post law enforcement agency. For example, it does not really have a standalone enforcement program, rather just a Division of Enforcement; it does not have the power to instigate civil actions, the capacity to settle, disgorge profits, or establish Fair Funds.

As to actual enforcement activity, we find that defendants will delay proceedings. They actually will resort to the judicial system to do so. Few penalties become final, most of which are merely fines. Individuals are

27. Mexico’s National Banking and Securities Commission (CNBV).

barred from serving as directors and officers in not even a handful of cases.

Sanctions are largely imposed on issuers rather than on individuals. And yes, there is primarily a targeting of disclosure-related misconduct, but this is more procedural and automated, like fines aimed at inducing compliance rather than punishing serious misconduct and sanctions.

Still, there has been an increase in enforcement activity, however low, and there has been some unprecedented sanctioning and fines against big corporations.

Moving on to self-regulation, another channel, it is available now. There is a clearly detailed framework, and it is government-backed, so the regulator would have the capacity to delegate supervisory and rule-making powers to these self-regulatory organizations²⁸ but has not really done so.

There is an interesting partnership between the regulator and the stock exchanges that has been successful to some extent in identifying misconduct, but the supervisory role of the exchanges is also automated, very procedural, and basically limited to trading suspensions and halts. They have, however, been effective. We found that issuers would comply quickly after being suspended just to resume trade. Still, this is procedural.

Criminal justice has become quite popular. As a result of the recent reform resulting in this new framework, criminalization of market misconducts has provided for new enforcement avenues.

Still, there is difficult access because a specialized agency would have to issue a referral, a determination that there has been a breach, and only then can one pursue criminal action, so you can only imagine how difficult it is to get that referral. In any case, it has become a way of exerting pressure.

The incentives that I mentioned earlier for compensating victims in exchange for mitigating or attenuating penalties have made their way to an informal settlement-like dynamic in action, which is very interesting. To be fair, there have been recent referrals by Mexico's CNBV that have resulted in relevant sanctions.

Private rights of action—that is why we are mainly here—ironically, would be what you would least expect to find in Latin America, Mexico, and other emerging jurisdictions. For the same reason, I think it makes for good conversation.

28. Including the Mexican Stock Exchange (BMV) and the Asociación Mexicana de Intermediarios Bursátiles (AMIB).

There are enhanced fiduciary duties with this new framework, involving breaches in connection with civil liability—things that had never really been part of the legislation before. So, it is a novelty, but it is quite interesting and a potentially viable way to seek redress resulting from breaches to the duty of care and the duty of loyalty in connection with disclosure-related misconduct.

As a securities litigator in Mexico—who is handling a few of these cases—stated: it is a “twilight zone.” It is very premature.

There is limited ability to instigate civil actions. The regulator is restricted to administrative sanctions and to issuing criminal referrals. Courts—as mentioned earlier—are just not acquainted with capital markets matters yet. Shareholder suits are rather filed in connection with minority rights and battles for corporate control, so civil liability and damages in connection with individual investors are unavailable, even via a direct suit. That is a big constraint.

Mexico is really only starting to witness the first judicial cases regarding the public firm. There is no awareness of takeover litigation, but just a handful of visible, ongoing disputes relating to takeover activity, like, for example, the first case challenging the validity of a shareholder’s rights plan²⁹, and derivative suits against directors for disclosure-related breaches.³⁰

But what is the nature of these cases? Again, closely-held firms, family feuds, issues of minority protection rights vis-à-vis controlling owners, not really aimed at compensating individual investors. There are very few precedents. There is really a lot of uncertainty as to how to entertain and resolve these matters.

I will give you a few examples of ongoing fundamental, elemental issues that are still in question—things as basic as a court’s jurisdiction, direct admissibility of a suit and whether a civil court is even the competent authority to determine a capital markets breach. Defendants will argue that the regulator must first make that determination and issue a referral, and that is yet to be resolved.

29. Grupo Mexico v. Grupo Aeroportuario del Pacífico (GAP). See discussion at *infra* at note 31.

30. For example, a family feud that implicated the former Chairman of Grupo Posadas, who brought suit against the board of directors for disclosure-related breaches. See Miriam Paredes, *Gastón Azcárraga Demanda a Grupo Posadas*, DINERO EN IMAGEN (Nov. 5, 2013), <https://www.dineroenimagen.com/2013-11-05/28447> [<https://perma.cc/2VA6-WYKY>] (last accessed Feb. 25, 2018).

Standing to sue: The high possibility that a suit will be dismissed just because depository institutions are not issuing the certificates of holders, is an example. Issuers are, of course, not providing lists of holders. In action, this has been addressed informally via brokers, but what they provide does not have a seal, does not have a signature, so it is really just a dismissal waiting to happen. It has been a significant problem in practice with matters like the *Grupo Aeroportuario del Pacifico* (GAP) case³¹ and the *Abengoa* case.³²

Establishing damages: Again, very premature. No judicial precedents of this in connection with securities markets. We found a legal culture against awarding damages. Damages, of course, must be a direct and proximate consequence of the breach, but for some reason, in this jurisdiction they are held to an extremely high standard. There is no room for circumstantial evidence. It is an even tougher scenario given market sensitivity. Judges will not go there.

Securities class actions: There is a new collective actions regime, but it did not pick-up shareholder litigation. It was just constrained to consumer rights and environmental matters.

It is arguable whether shareholders could legally pursue a direct suit against a corporation for disclosure-related losses, so the only clear route would be a shareholder derivative suit known as a “liability action.”

The fiduciary duty to disclose relevant information as a result of these reforms lies on the CEO and other relevant officers. So, there is the

31. The matter (which derived from a suit brought by Grupo Mexico SAB v. Grupo Aeroportuario del Pacifico, SAB challenging the validity of GAP’s shareholder’s rights plan) was decided in favor of Grupo Aeroportuario del Pacifico (GAP) by the Supreme Court of Justice in June 2015 (Juicio de Amparo Directo 23/2014 filed by Grupo Aeroportuario del Pacifico, SAB (GAP), Suprema Corte de Justicia de la Nación (SCJN), June 17, 2015 (Mex.). See Noe Torres, *Mexico court rules for airport operator GAP vs Grupo Mexico*, REUTERS (June 17, 2015), <https://www.reuters.com/article/us-grupomexico-gap-mexico/mexico-court-rules-for-airport-operator-gap-vs-grupo-mexico-idUSKBN0OX2HX20150617> [<https://perma.cc/72R2-TGZN>]. The final decision from June 2015 is available at <https://www.scribd.com/document/318217111/SCJN-Sentencia-GMexico-vs-GAP>. However, as a result of a different constitutionality claim raised by Grupo Mexico SAB (Juicio de Amparo Directo 275/2016 filed by Grupo Mexico, SAB, H. Octavo Tribunal Colegiado en Materia Civil de la Ciudad de Mexico)(Mex.)), the matter is again before the Supreme Court of Justice, currently pending a final decision (Amparo Directo en Revision 4292/2019, Primera Sala de la Suprema Corte de Justicia de la Nación).

32. Banco Base, S.A., Institución De Banca Múltiple, Grupo Financiero Base Vs Abengoa México, S.A. De C.V., Juicio Ejecutivo Mercantil, Expediente 8/2016-P.C., Juzgado Décimo Cuarto De Distrito En Materia Civil En La Ciudad De México.

argument that the corporation would not be accountable for not disclosing this information and the shareholders would have to file suit against these officers and not the corporation.

This liability action is really the only remedy available to pursue civil liability for a breach of duties in connection with disclosure. It rules out a direct suit, then. The liability action may be brought by the issuer or by shareholders against directors and officers but, again, compensation is just for the corporation.

No direct benefit is derived from the damages collected. Courts may not force disgorgements, so access is limited to shareholders with 5 percent ownership, which would be very difficult for an individual shareholder to obtain in jurisdictions like Mexico or other Latin American ones with strong controlling owners.

It was an improvement from the general corporations law that had a 33 percent threshold, but still it is difficult. There is an expectation that with new institutional investors and funds that are starting to form blocks—up to 10–13 percent in some cases—there might be increased possibilities for this, but still no direct compensation.

So, yes, individual shareholders are being precluded as a result of this.

With this, I will conclude. I think the Mexican securities market has some problems with its new framework, but there are shortcomings and gaps now being bridged.

Thank you.

PROF. GELTER: Thank you very much for this very interesting presentation.

I will use my moderator's privilege and ask a question for Professor Fox. Your comments made me think about the *Toshiba* case you were describing. If that case holds, what can a foreign issuer do who has an unsponsored ADR? Is there much they can do to avoid getting caught up in the U.S. litigation?

PROF. FOX: I think that is why it makes the jurisdiction-to-prescribe issue interesting because I do not see what you can do. If I am a public issuer anywhere in the world, I can anticipate maybe the securities will reach the United States, and then if I make a misstatement with scienter—*well, I chose to issue securities, I knew they would reach the United States*—but I do not see what you could do about it.

How big a problem is it? Geoff probably has a better idea of how many of the big companies are unsponsored. I assume most of the bigger companies are sponsored, but obviously Toshiba was not.

MR. JARVIS: Two things.

One, I think unsponsored ADRs are not that big. There is just not that much money going to be at stake in the United States, and people will bring the suits, but they are not subject to that much exposure.

I would argue: Look, I am a plaintiffs' lawyer, but as an intellectual matter I would argue that possibly an unsponsored ADR being subject to U.S. rules is contrary to the main holding of *Morrison*, which is that many U.S. investors purchase securities issued by foreigners on home exchanges. There is a real preference among investor types to actually buy on the home exchange.

By that same rationale, you can expect that if you issue a security in, say, Switzerland, that a U.S. investor will buy it, and you can be pretty sure they will. A good chunk of the world's capital markets are here. Yet, in those places, an exchange trader would not be liable even though you know a U.S. investor is going to move on it.

Toshiba strikes me as a little squirrely on that, but from my perspective it is just not a lot of money, so it does not matter much.

PROF. FOX: I gave you a black-letter lecture. I should add my own view is—and I have some agreements with Geoff and some disagreements with him—fraud-on-the-market suits are not as easily justified by compensation because you are as likely to be a winner as a loser when a corporation makes a misstatement.

If it inflates the price, we are talking about people who cannot establish reliance, so they have not been sucked into the transaction by the misstatement; they are just either buying or selling at that time. If you buy and sell in the market over time, maybe you will be a winner sometimes and a loser sometimes. But I do think they have significant deterrent effect for the reasons Geoff has suggested.

Then we have to ask, "Well, do we care whether foreign issuers make misstatements or not?" If, in fact—in terms of ordinary, uninformed investors buying and selling securities in the United States—they can be as helped as hurt by those misstatements, the real function then of the fraud-on-the-market suit is, as I say, to deter.

The reason you would be concerned with deterrence is it makes share prices more accurate. It is really the home country that benefits more from the capital allocation and managerial discipline aspects of accurate share prices. So, I think it ought to be the home country, or the country where the company has its center of gravity economically, that determines whether a fraud-on-the-market type action is a good idea or not. I think it has a significant deterrent effect.

It is also very expensive, resource-wise. You have to pay Geoff's fees; you have to pay the defense lawyer's fees. He has told you the amounts that are involved. It is expensive. It is also expensive in terms of company time defending these things.

So, it is a balance. The United States has come out one way, but if I am Japan, or France, or Germany, I would not necessarily see things the same way.

PROF. GELTER: Maybe I can bring Eugenio back into the discussion. One thing I found interesting that you said was that Mexican issuers issue ADRs deliberately subject themselves to the American "policing" service that Geoff and his colleagues provide in the form of litigation. Is that part of it?

MR. CÁRDENAS: It is part of it.

PROF. FOX: I could imagine that if an issuer wants to opt in, you are welcome to it, but why connect listing or trading in the United States with it?

MR. CÁRDENAS: I think that Mexican issuers saw the advantage of being subject to U.S. standards. There was that signaling involved. But, as soon as the Sarbanes-Oxley Act of 2002 (Sarbanes-Oxley)³³ was enacted, most of them left—to the extent that this answers your question—because the level of enforcement that ultimately resulted from the current framework in the United States drove many of them away.

PROF. FOX: What was in Sarbanes-Oxley that was most burdensome?

MR. CÁRDENAS: I would say the penalties under Sections 302 and 906, holding corporate officers liable—I found that more compelling than the costs of compliance of maintaining a listing under Section 404, because some of these firms already had internal controls in place beforehand.

MR. JARVIS: You always look to the personal incentives. For the corporation's costs when you comply, that is the shareholders' money. But "Take my bonus? That is my money? Throw me in jail?"—that is the most effective deterrent. Realistically, it is human beings who run these companies, and at the end of the day it is what hits their pocketbook and them personally, I think, that is the most effective. It is why I think private suits are useful, but we are not as good as throwing people in jail. We are just not.

PROF. GELTER: I think we had a question from the audience.

33. 15 U.S.C. § 7201 *et seq.* (2002).

QUESTION: I am a member of the *Journal of Corporate & Financial Law*. I am originally from Bolivia, from Latin America, and my question is for all the panelists, but maybe for Eugenio in particular.

In emerging markets how big a role do you think corruption of the judicial system plays in the lack of enforcement? Looking at what happened with the *Petrobras* case,³⁴ in a lot of emerging countries companies are “too big to fail,” translating to individuals that are entrenched in corruption schemes with the government, and it is very hard for a court, a simple judge, to eventually go after them.

PROF. GELTER: Let me just quickly say that this was a question that we asked in our questionnaire to the authors of the book, and I think almost nobody answered that question.

MR. CÁRDENAS: My experience from the research is that the association with corruption was mostly in the criminal realm, not much or at all associated with the regulators. In Brazil and other jurisdictions, they seem to be very highly regarded. They maybe were more subject to undue political influence via the ministries of finance, who discretionally can appoint and remove the heads of the agencies—unlike the United States, where you have a Commission, where they are there for fixed terms, and where they cannot be removed unless there is some serious cause. Brazil is the only one that has adopted the U.S. model.

This was part of the questionnaire. It was, for example, addressed to a former head of enforcement of Mexico’s Commission, who clearly noted there may be political influence involved, though not necessarily corruption per se.

Just to complete the idea, I would say that more than corruption via the judicial system there are judicial remedies like the *Juicio de Amparo* and otherwise, through which issuers or defendants are able to delay proceedings, and this includes issuers that were actually sued by the U.S. SEC—like the *Azteca* case³⁵ that we mentioned here—criminally and civilly. In Mexico, even just trying to serve process against an issuer is a problem. It is very concerning.

PROF. FOX: You mentioned Brazil. The Commissioners of the Comissão de Valores Mobiliários (CVM), the Brazilian SEC, I think have consistently been very reputable people, but they did not pursue *Petrobras* very vigorously. They left it to others.

34. In re *Petrobras* Sec. Litig., 116 F. Supp. 3d 368 (S.D.N.Y. 2015).

35. SEC v. TV Azteca, S.A. de C.V., et al., Civ. Action No. 1:05-CV-0004 (EGS) (D.D.C. 2006).

MR. JARVIS: I can actually speak to that a bit, particularly *Petrobras*. In my foreign work, we are interested in being able to obtain money, and there are just a lot of jurisdictions in the world where we simply will not go. It depends.

I would not go to Italy; it just takes too long. We represent primarily foreign investors who are foreign to the market where the fraud occurred, and you just do not want to get hometown-ed. It is a real consideration.

In the United Kingdom, this is not an issue. In the United States it is usually not that much of a problem. In Japan, it is absolutely not a problem. Other places? Netherlands is not a problem particularly; Germany, not a problem.

Other countries I would not hold to that, and we were particularly concerned—we represented a vast pool of investors who had invested in *Petrobras*—about the judicial system there to the point that we would not do it.

But *Petrobras* has in its bylaws a mandatory arbitration clause, which has been upheld. So, if you want to bring a case in Brazil against *Petrobras*, you have to bring an arbitration before the Commercial Chamber, and that has a better reputation. There are a number of arbitration proceedings brought by substantial U.S. investors, European as well, that have gone the arbitration route. They would not go the court route because there is just not enough faith in the judiciary there, quite frankly.

PROF. GELTER: We will continue the discussion in the second panel.

MR. BRUNO: Give a warm hand and thank-you.

PANEL 2

PROF. CONAC: I want to thank warmly the organizers of the conference—Michael Bruno, Sean Griffith, Fordham, Martin Gelter—and also the members of the panel who accepted to come and comment on our book and also all the people who contributed to the book, some of them being here.

I want to make a short presentation on some of the results we got from the book. It was a very interesting experience in terms of trying to understand what was going on in the world.

We all had this idea—when I came first to the United States to study here—that the United States had the best financial markets in the world, had the best enforcement system, which I think is true. But what about the others? Well, the others have catching up to do, still now.

If you look at the situation in the world, essentially, the United States has still the most effective jurisdiction to protect investors. I think this is unchallengeable. When you look at all other countries, they are all facing problems. So, that is the good news. But there is also some bad news. It means there are not so many countries that are really rising to the level of the United States.

One point which was really interesting, which we investigated, is whether or not jurisdictions accept the idea to indemnify investor losses from securities markets. We just got the presentation by Eugenio on Mexico, where basically they say, “We do not know; probably that is not the case.”

But twenty-five years ago, when I came to the United States, this was kind of *terra incognita* in most of the world. People would say, “It is not possible.”

I can remember in France when I was writing my PhD, when academics and lawyers would say, “That is not possible,” I was unconvinced about this. It is tort law, and tort law is everywhere. And you have damage, you have fraud, you have some causation. There was no obstacle certainly. But people were just stuck on this: they said, “No, it has never been decided and it will not be decided.” Well, there is a change of heart now in France. It took just two decisions from lower courts to change this just like this [snaps fingers], and then the Supreme Court in France just accepted it.

In the world, there were many countries, not just France, who all also said, “It is not possible; it is U.S. stuff. Leave it to the United States, and maybe Canada, but we should not get into this.”

Well, I think what has made the difference is the fact that you had huge development in the securities market since the fall of the Berlin Wall in 1989. Before the 1980s, many economies and firms would finance through banks, not so much by securities market. So, I think the protection of the investor in the securities market was not a big issue in many countries.

Then, after the fall of the Berlin Wall, you had many countries who basically embraced the U.S. role—even Russia at some point—and many countries looked at the United States as the model to follow and therefore took the lead from the United States.

Another key point is the fact that with technology—the Internet and communication—many more people became aware of this U.S. system of indemnification. Before it was left only to a few scholars, academics, and therefore it could not have an impact on a wider audience. Then, with easier access to knowledge by internet, you had scholars and people who started to say, “it is possible in the United States. Why should it not be possible in our place, in our country, where we have large markets, big scandals?”

What I could spot in the book also is that you had reforms which introduced indemnification for investors, usually after a wave of scandals. So, if you had a big shock and you had many people affected, then it triggered something in the minds of people and people said, “Why should we not be indemnified? Why is it possible in the United States and not here?”

The link to this is through dual listing because if you have dual listing—the *Vivendi* case³⁶ was a good example in the sense of when in France it was recognized already—if you have dual listing, people will say, “Well, if you bought the shares of the French company Vivendi in the United States, you get compensation, but if you bought them in France, you get nothing. So, we say it is not fair.” This kind of discussion was started everywhere, which put pressure on judges.

This was pre-*Morrison*—although *Morrison* changed some of these things—and there was fear of jurisdictional competition. In Europe, governments would say: “Well, it is not acceptable that people go to the United States to get indemnification pre-*Morrison*. It is not fair that our business is not decided in our courts, in our countries, but in the United States.” Why was it so? Because plaintiffs would say, “Well, this is where

36. In re Vivendi Universal, S.A., Sec. Litig., 381 F. Supp. 2d 158 (S.D.N.Y. 2003); Cour d’appel [CA] Paris, May 19, 2014, 11/03728 (Fr.).

we can get relief.” Therefore, this was not politically acceptable, which had an influence on legal developments in many countries.

Germany introduced a securities class action act, which was very limited, with the intended purpose to prevent people from going to the United States. So, you had, in a sense, countermeasures which were organized in some countries to say: “Okay, we understand. We do not want you to go to the United States, because it is kind of humiliating for us, so we will do something for you here.”

Still, what we see from the book is a strong reluctance to embrace the full U.S. model. Professor Gelter mentioned this. There are a few jurisdictions—Canada, Australia, Israel, maybe the Netherlands—moving in this direction, which embrace something close to the U.S. approach, but most others say: “Okay, we accept the idea of indemnification, that is okay. But we do not accept all which goes wrong—the New York lawyer, the contingent fees, the pre-discovery aspect—so we get some of this stuff but not everything.”

The situation could be changing again in Europe because of the *Volkswagen* emissions scandal (Dieselgate) which led the European Commission to propose in April 2018 a directive on representative actions for the protection of the collective interests of consumers. The thinking was, “Well, in the United States, people got \$20,000 per car,” so people in Germany say, “Hey, why do they get money in the United States and nothing in Germany when it is a German company?” So, they complained, and there was huge political pressure on the European Commission to do something. The *Volkswagen* case is about consumers, but in Europe, people feel that investors in securities should be also treated a bit like consumers. Therefore, prospectus liability and broker-dealer liability were included in the proposal. The proposal has not been adopted yet, as there is an opposition.

Europe came up with something which is not a class action system. This was inspired partly by the French system, where you appoint a lead plaintiff. The lead plaintiff is an association that has to be approved by the State. In France it has been a failure. It does not work. Anyway, that is where the model came from.

But one thing which has had an impact is that many more countries now accept the idea of indemnification. For instance, consider the issue of *exequatur* of foreign decisions in Europe. If you have a nice indemnification decision in the United States against an issuer, the lawyers will say, “Well, we want to indemnify people, and we want to execute it back into Europe, for instance.” for many years people said, “It is not possible because it goes against the public order. This class action

system is not acceptable, we do not recognize the indemnification of losses, so we do not enforce a U.S. judgment by granting exequatur and that assets from the company, for instance, will be seized in Europe. So, if you have a company listed in the United States but with no assets in the United States, what is the point of suing in U.S. courts?"

What I can see now is that this would be acceptable. Why? In Europe, you have many countries that have some form of class action, so it is not against public order that the indemnification of losses is accepted in principle in most jurisdictions.

MR. COSENZA: Just a question because I deal with these cases all the time. The reason it is this way is that it is not the policies behind the governments—some more liberal governments will want to have investors be indemnified or have recovery for losses—but that the discovery systems set up in a lot of these jurisdictions do not permit broad discovery.

So, even theoretically, if you have a class action system, it is very difficult for plaintiffs to succeed because they are not able to get access to the company's documents and the like. So, they have these cases and they try to bring them as purported class actions—I know the French system has collapsed—but they cannot really prove their case without robust U.S.-style discovery, which is why people prefer to bring them here.

PROF. CONAC: That makes a lot of sense to me. This is why actually I am pleading for strong public enforcement in Europe because you have this discovery problem.

But at the end of the day, also when you look at the way securities fraud is analyzed from a legal perspective in jurisdictions in Europe and Asia, what you see is we are still on the learning curve, more or less. A lot of theories have not been tested very much. As was mentioned before by Geoffrey, you see Japanese judges looking at the U.S. legal approach and simply incorporating it in their decision.

Many countries accept the idea of indemnification, but local judges lack expertise in this. Basically, there is a kind of time-lapse, and it takes some time before cases get developed, and therefore, you end up with under-enforcement by private plaintiffs in many countries.

So, you still have a huge difference with the United States. Even if you accept the idea of indemnification in a foreign country, when at the end of the day people get less, you basically have indemnification as law on the books, but not really law in action.

This is why in many jurisdictions people rely on public enforcement, and this is also a different starting point from the United States.

Public enforcement is everywhere. The model that has developed was also, in a sense, influenced by the United States. This is a system of administrative sanctions. So, in the United States, the SEC would traditionally go to a federal court and ask for a fine. This has been accepted outside the United States, so you find this SEC model with administrative sanctions—although not always severe sanctions—almost everywhere.

Also, many countries have underdeveloped securities markets, which means there are a few cases. But, of course, for a public prosecutor it does not make any difference; if there is some kind of a violation of securities laws, he can enforce them even if there is not much money involved or damages to the market.

There was also a big change in Europe with the great financial crisis. Before 2008, you could argue that even public enforcement was kind of weak; but after 2008, the impact was so large in Europe that the EU legislator came up with new legislation that wanted essentially to reach the U.S. level, and the supervisors became much more active in terms of enforcement.

In the United Kingdom, there was a very nice example. Before, the United Kingdom was really a place where not much would happen in terms of public enforcement. After 2008, there were many more cases.

Of course, the SEC has been also enforcing against foreign issuers. You have stronger public enforcement outside the United States now against domestic issuers and you still have some SEC enforcement against these foreign issuers in the United States. So, you can ask the question: Why is the SEC spending taxpayer money on enforcement against foreign private issuers because now they are doing their job in Europe?

Well, I would say, “Yes, they are doing their job, but not that much, and not everywhere.” So, for those jurisdictions that are not doing a good job in enforcement, I think it is important for the United States to continue to set the tone at the international level and also incentivize, in a sense, domestic jurisdictions to do this work.

My last point is about the connection between public enforcement and private enforcement.

What I see in many countries is that, even if you have, at least in principle, recognition of indemnification of investor losses, there are difficulties. Indemnification only covers a small part of the class that was affected. It is also costly, so investors do not do it that much. It is more a law-on-the-books approach than a law in action.

Public enforcement is acceptable to protect investors, but public enforcement does not add much in principle to private enforcement. Why? Because if a company is being sentenced for fraud, for instance, or misrepresentation by some security supervisors, there is no adjudicative effect. So, you cannot go to a court and say, "Hey, you know that there have been comments by the administrative court, so you have to give me damages because the offense is proven." No, you have to start all over again.

One of the ideas that comes from the book is that this system of Fair Funds that was developed in the United States could help private investors benefit from public enforcement. So, the SEC can slap a fine and the money will go to the investors. You would have a kind of public-private partnership, and this would solve the issue of these more or less strong attempts by many jurisdictions to duplicate to a certain extent the U.S. system where you have real indemnifications through private actions.

In my view, that would still be fair even if the indemnification does not raise to the level of the United States. because the reluctance to U.S.-style securities class actions is strong. Investors would get something, even if it is not that much, with no or limited costs, since public enforcement is accepted everywhere. So why not put the two together, and if a jurisdiction does not want to introduce Fair Funds, then why not change the laws such that you could have, let us say, pretrial discovery done by the public enforcers and then sent to the plaintiffs' lawyers? This is currently impossible in most jurisdictions. Why? Because there is professional secrecy, so you cannot share with private parties. So, this could be changed to provide an alternative to pretrial discovery that is anathema in many jurisdictions.

My conclusion from the book is essentially: Okay, we are moving there, but we are very far away actually from the United States, whether it is public or private enforcement. One thing that is clear is there is more acceptance of using public enforcement, especially administrative sanctions, and maybe this is a way to solve the reluctance to U.S. style securities class actions while providing indemnifications of investor's losses. This is another approach that could be discussed.

Thank you.

PROF. FISCH: Thank you, Pierre-Henri Conac and Martin Gelter, for including me in this conference. The book is a fabulous project, and this impressive conference is a great tribute to the work that you have done on it.

A project of this magnitude—comprehensively exploring Global Securities Litigation and Enforcement across dozens of jurisdictions—is incredibly valuable for two reasons. Pierre-Henri Conac’s comments stressed the idea of learning by example. Other ways of describing this phenomenon are regulatory competition or contagion. We have capital markets around the world, we have corporations and regulators around the world, and a book that explains how multiple jurisdictions are addressing questions of investor protection and capital market protection generates a tremendous number of ideas.

Somebody before the conference said, “What are you doing here? I thought you only worked on domestic corporate governance and securities regulation.” I do not think anyone can responsibly take that approach because, in an increasingly global world, practitioners, policymakers, and regulators learn so much from other countries’ experiences.

What do I mean by globalization? One aspect is the growth of multinational corporations that operate and increasingly raise capital from investors all over the world. Investors are expanding their willingness to invest in corporations that operate and trade in jurisdictions other than those in which the investors reside. We also have a variety of developments in terms of market infrastructure and products and market intermediaries—and we do not even know where blockchain and cryptocurrency are going in that regard—so we need some method of sorting out regulatory claims, as well as some idea of the best ways of dealing with enhancing capital market efficiency and addressing fraud. I think the book puts all of those issues front and center.

One of the biggest challenges presented by global capital markets is disagreement about the goals and priorities of regulation. Even in the U.S. market, we are not clear which regulatory objectives are most important. Geoffrey Jarvis emphasized the importance of investor protection. Others have focused on competing goals such as market protection and deterrence. Merritt Fox has studied the extent to which the capital markets price the risk of fraud, as well as the role of securities regulation in making the markets more efficient.

The existence of multiple goals raises some interesting questions. Even within the United States, there is some tension among these goals. To protect investors, we may sacrifice some degree of market protection. Similarly, should different jurisdictions be free to determine exactly how efficient they want their capital markets to be?

We also must recognize that, around the world, markets are structured very differently. Who is the typical investor in a particular

market: institutional investors, retail investors, government actors? Do they need protection? Do they need protection through private litigation or public enforcement, or do they have alternative mechanisms available? Are there intermediaries that can play a role in enhancing efficiency by collecting and evaluating information, and can these intermediaries also address some of the agency problems that we see in the U.S. system?

Although we might take a pluralistic approach to regulation, we also have to recognize the risk that globalization enables issuers to race to the bottom by choosing a jurisdiction for their transactions in which there is a minimal level of regulatory oversight. We can all think of examples of situations in which that has occurred.

Merritt Fox spent a lot of time talking about the Supreme Court's *Morrison* decision. Yuliya Guseva and I have both studied *Morrison* and its effects empirically. What *Morrison* did was respond to these policy choices in the context of private litigation, and the Court essentially said: "There is this problem of different jurisdictions trying to impose their procedures and their rules, and what we see is a potential migration of private litigation, private litigation involving primarily non-U.S. parties, into the U.S. markets" for the reasons that the first panel was talking about.

A good example of this is the *Vivendi* case,³⁷ which was a lawsuit that was filed prior to the *Morrison* decision. *Vivendi* was a prototypical global class action. The class consisted of investors who bought Vivendi stock in markets all over the world and included people who resided in countries all over the world. The initial liability exposure of Vivendi was \$9 billion based on the claims brought on behalf of the global investor class.

Only 10 percent of Vivendi's trading volume was in the U.S. capital markets, however. Although *Morrison* did not eliminate claims against Vivendi based on the U.S. transactions, the *Morrison* holding cut back tremendously on the scope of Vivendi's liability exposure. After *Morrison*, more than \$7 billion of the *Vivendi* verdict was dismissed, and the case subsequently settled for approximately \$78 million.

One possible reaction to these developments is to say, "Well, that consequence is problematic because it leaves most of the Vivendi investors without recourse in terms of compensation." Another concern is that the ultimate settlement in the case, which was limited in size because

37. In re Vivendi Universal, S.A., 242 F.R.D. 76, 109 (S.D.N.Y. 2007), *aff'd*, 838 F.3d 223 (2d Cir. 2016).

of the limited U.S. jurisdictional hook, was too small and resulted in under-deterrence of a global fraud. There is a third option, however. One can view the *Morrison* test as implementing a clever balance. The United States has an interest in *Vivendi's* effect on the capital markets, but relative to the rest of the world's interest, that interest is relatively small. So, the U.S. regulatory hook, the degree to which U.S. courts and U.S. law will be involved should be proportionate to *Vivendi's* presence in the U.S. capital markets." What I see in the American depositary receipt (ADR) cases that Merritt Fox was talking about is, by and large, an effort by the courts to strike that same balance.

It is important to remember that the *Morrison* decision did not hold that multinational corporations are immune from private litigation in the United States. In fact, Congress, after the *Morrison* case, decided to cut back on the scope of *Morrison* by providing the SEC with broader jurisdictional authority than private litigants. Congress took this step because some of the concerns about potential abuse of class actions stemming from agency problems are not as problematic in the public enforcement setting. It is worth noting, however, that it is unclear how active the SEC is in bringing enforcement actions against foreign issuers. The extent to which the SEC fills any potential gap stemming from the reduction in private enforcement is unknown.

Overall, however, the *Morrison* test is consistent with a "keeping in your own lane" approach to capital markets regulation. The United States regulates the U.S. capital markets, it applies U.S. law to protect investors who transact in the United States, and it does not seek to impose U.S. regulation on the rest of the world.

Why then, might the "stay in our lane" approach worry us? Well, Pierre-Henri Conac and Martin Gelter have put together a book that describes the state of securities enforcement elsewhere in the world, and there is evidence in the book and from the speakers today suggesting that the state of enforcement is not so great everywhere. In some jurisdictions there are substantial limitations on the effectiveness of private enforcement, public enforcement, or both.

Some regulators have budgetary constraints. Some regulators have political constraints, and the political constraints are even more problematic in countries in which there is substantial government ownership of private companies, giving the regulator additional reasons for lax enforcement.

Moreover, even in countries without significant state ownership of corporations, many big corporations are valued state assets. As a result, regulators may not want to enforce the securities laws too aggressively,

particularly if doing so involves the protection of nonresident investors. The choice between protecting valuable local businesses and nonresident investors presents an obvious political tension.

Public regulators also struggle with the fact that, in many cases, they are under-resourced and less expert than the companies against which they are trying to enforce these laws. The SEC struggles with that problem. In many cases, junior SEC enforcement lawyers are trying to bring a multinational corporation with expert defense lawyers to heel. It is not easy to do that.

And, of course, the effectiveness of public enforcement suffers from the fact that, by and large, it does not provide compensation to defrauded investors. Commentators have, of course, debated the extent to which victim compensation should be a major objective of the federal securities laws. But this is an important policy question.

Let me highlight a few alternatives to the U.S. system of private enforcement that are suggested or inspired by the book and its comparative approach.

One possibility is a system of public enforcement with some sort of Fair Funds-type provision. The idea is that public enforcers would be empowered to recover fines and monetary penalties and to distribute that money to injured victims. This system would rely on public enforcement, reducing the potential concerns about private litigation such as litigation abuse, discovery costs, and so forth, but it would also provide victim compensation. The United States adopted this approach in the Sarbanes-Oxley Act of 2002.

Another possibility is a system that relies on a public-private partnership to pursue enforcement actions. In the United States, the Federal False Claims Act allows private actors, people who are not defrauded, to pursue claims of fraud against the federal government. These *qui tam* actions allow plaintiffs to hold people like government contractors accountable and serve as a supplement to discipline potential failures in public enforcement.

Securities enforcement could implement a similar system in which private litigants would be empowered to bring enforcement actions, perhaps with the oversight of a regulator like the SEC.³⁸ The advantage of the *qui tam* action is it responds to situations in which the government regulator is unable or unwilling to act. In other words, a private plaintiff

38. I proposed such a system some years ago. See Jill E. Fisch, *Class Action Reform, Qui Tam, and the Role of the Plaintiff*, 60 LAW & CONTEMP. PROBS. 167 (1997).

is the spur for a potential enforcement action, so the structure provides a useful safety valve. In the false claims area, *qui tam* actions have been incredibly successful and resulted in the revelation of some huge frauds and the recovery of substantial sums of money for the U.S. government.

Another option is a system in which an intermediary, a government agency, or a private organization is empowered to act on behalf of investors. There are a number of jurisdictions that are experimenting with this approach, not just for litigation but for other kinds of collective investor action—for shareholder engagement, for compliance with stewardship principles, and things like that. It is a great idea.

Another alternative is a system that relies on greater empowerment of substantial shareholders. It may be possible to reduce litigation abuse by limiting courthouse access to shareholders that meet minimum ownership thresholds.³⁹ Concededly one concern about this system is that, without a class action mechanism, it would leave small shareholders out in the cold. As a practical matter, however, it is important to recognize that the value of victim compensation through securities litigation is somewhat overstated. Small shareholders simply do not recover very much money in securities fraud cases.

I was a plaintiff in the *WorldCom* litigation.⁴⁰ I recovered, I think, \$25 from the private action, and then from the Fair Funds distribution, I think I recovered another \$10.⁴¹ I could have done without that \$35. I could have lived.

MR. COSENZA: And now there is a multibillion-dollar recovery.

PROF. FISCH: Exactly.

But if large institutional investors can bring cases, even if they bring those cases as direct actions and only recover for themselves, we get

39. The Private Securities Litigation Reform Act partially incorporates this concept by enabling, but not requiring, substantial investors to oversee private securities class actions through its lead plaintiff provision. See Stephen Choi, Jill E. Fisch & A.C. Pritchard, *Do Institutions Matter? The Impact of the Lead Plaintiff Provision of the Private Securities Litigation Reform Act*, 83 WASH. U. L.Q. 869 (2005) (empirically examining the effect of the PSLRA on the involvement of institutional lead plaintiffs).

40. See *WorldCom Investors Win \$651 Million Settlement*, LAW360 (Oct. 27, 2005), available at <https://www.law360.com/articles/4365/worldcom-investors-win-651-million-settlement> (describing settlement of thirty-two different investor lawsuits against WorldCom and other defendants).

41. See Deborah Solomon, *For Wronged Investors, It's Payback Time*, WALL ST. J. (July 7, 2005), <https://www.wsj.com/articles/SB112069885934679133> [https://perma.cc/EZW6-GBST] (describing SEC's Fair Funds distribution in the *WorldCom* case).

enforcement, we get transparency, and we get deterrence and accountability, and, to the extent those are important goals, we accomplish something.

The earlier panel was talking about arbitration. Litigation in court is not the only potential avenue by which victims of securities fraud can seek recourse. In countries and jurisdictions in which the courts may be limited in their capacity to provide relief, arbitration may be an attractive alternative. We are still debating the advantages and disadvantages of securities arbitration in the United States as an alternative to litigation, but it is certainly attractive elsewhere in the world.

These are just some possible alternative approaches to securities enforcement and capital market protection. The value of a comprehensive analysis of securities enforcement from a comparative perspective—the value of Pierre-Henri Conac and Martin Gelter’s book—is that it highlights the fact that if we go beyond our own borders, we can think more creatively about new and potentially more efficient solutions to regulating the securities markets.

Thanks.

PROF. GUSEVA: Pierre-Henri Conac and Jill Fisch have set the stage for my more specific presentation. Before I begin, I would like to thank Sean Griffith, Caroline Gentile, and Martin Gelter for inviting me back to Fordham. Seven years ago, I was a Visiting Assistant Professor here for two years. It is always good to be back.

This project is about the SEC and foreign private issuers. But first, let me give you general background information and the incentives which motivated this research.

Obviously, when we are looking at the United States, it is indisputable that it has an exceptionally well-developed system of public enforcement and private litigation—private class actions. As Pierre-Henri Conac and Martin Gelter both discussed, in most foreign jurisdictions the traditional focus was on public enforcement. But there are recent developments, so well described in the book,⁴² and those include collective actions, class actions, and group actions.

The Netherlands is a fantastic example. It is a civil law jurisdiction; so, it is not a common law jurisdiction like the United Kingdom. Yet, the Netherlands has introduced a system similar to the one that we have in the United States. In February 2019, the Dutch further simplified their collective dispute resolution procedure.

42. GLOBAL SECURITIES LITIGATION AND ENFORCEMENT, *supra* note 1.

I want us to think about the enforcement system as a matrix of public enforcers and private enforcers at a national level. This is not a matrix where one element is a substitute for another. Instead, we can think about it as complementary goods or complements. For instance, a few studies—Choi and Pritchard, 2016 is a recent one⁴³—show the complementary or mutually reinforcing nature of the effect of enforcement and follow-on litigation in the United States on share prices. Obviously, public litigation per se is important; it has a standalone value. In other jurisdictions, however, whether those mechanisms are complete substitutes and what their standalone value is are not clear.

Take Russia as an example—I contributed a chapter on Russia to this excellent book.⁴⁴ Let me give you an *apropos* example. Imagine a large aluminum producer, technically a monopolist. It is a huge company with multiple holdings in various jurisdictions, headquartered in Russia. They conceal in their prospectuses, as well as in the Russian [equivalent of] 10-Ks, the management compensation system and hide the management company in an offshore jurisdiction, and this is not fully reflected in public filings.

Guess what happens next. The Russian enforcer—the Russian [equivalent of the] SEC—brings an action. Ultimately, a fine is paid. Here is the maximum amount of the fines that Russian corporations face: 1 million rubles. I checked with my parents this morning and, based on the rate of exchange, this would be something like \$15,000. Think about it. A huge multinational corporation in the extractive industry, an aluminum producer, pays less than \$15,000. And that is it.

But this is not the end of the story, luckily. Russia does have group actions, and this is where you can see the complementarity of public enforcement and private enforcement at work. Specifically, what is the underlying value of public enforcement and of those \$15,000 in terms of deterrence? Not much, probably. However, private plaintiffs and private shareholders quite often do the following: they first report a possible violation to the [national securities] regulator; the regulator investigates and imposes a fine; and then they bring a private suit or group action. As there is no proper discovery per se, the shareholders can bring a private action using the facts established during the administrative proceedings

43. Stephen Choi & Adam C. Pritchard, *SEC Investigations and Securities Class Actions: An Empirical Comparison*, 13 J. EMPIRICAL LEGAL STUD. 27 (2016).

44. Yuliya Guseva, *Russian Capital Markets and Shareholder Litigation: Quo Vadis?* in GLOBAL SECURITIES LITIGATION AND ENFORCEMENT, *supra* note 1.

instead of seeking limited discovery in court. There is complementarity in this sense.

At the same time, this matrix, public and private, is incomplete. As Jill Fisch and Merritt Fox discussed, we have an international, global system, which means that when a company faces an under-enforcement problem, it may go to another jurisdiction and cross-list, distinguishing itself from its domestic peers who are not cross-listed in a jurisdiction such as the United States.

When this happens, when a company voluntarily submits itself to the jurisdiction of the SEC, the SEC is faced with a dilemma, or rather a question: What is the optimal approach to enforcement against these foreign private issuers, considering that they are already subject to oversight and the liability regimes in their home jurisdictions?

That was the motive which animated this particular project.⁴⁵ I looked at all enforcement actions brought by the SEC between 2005 and 2016. *Morrison* was a watershed. I used it as a central example and analyzed cases filed five years before and five years after the *Morrison* decision.

Why *Morrison*? As Merritt Fox described, it limits the extraterritorial reach of U.S. securities law. Correspondingly, it may have a negative effect on private litigation by altering, for example, the incentives of private attorneys to bring class actions against foreign companies. For instance, their expected payoff may be lower since the class size would be smaller. As the incentives change, private enforcement may go down. Consequently, the SEC may step into this lacuna to provide adequate deterrence.

My main finding is that this is not what happened. There are no significant changes in SEC enforcement. Instead, the SEC does the following: it basically pursues its traditional lenient approach to foreign issuer enforcement. Some studies in the past also established similar results, starting with Siegel's study in 2005.⁴⁶ Surprisingly, nothing

45. The presentation discusses Yuliya Guseva, *The SEC and Foreign Private Issuers: A Path to Optimal Public Enforcement*, 59 B.C. L. REV. 2055 (2018), <https://lawdigitalcommons.bc.edu/bclr/vol59/iss6/5> [<https://perma.cc/AK3L-SUSS>].

46. Jordan Siegel, *Can Foreign Firms Bond Themselves Effectively by Renting U.S. Securities Laws?*, 75 J. FIN. ECON. 319 (2005). See also Natalya Shnitser, Note, *A Free Pass for Foreign Firms? An Assessment of SEC and Private Enforcement Against Foreign Issuers*, 119 YALE L.J. 1638 (2010); Erica Gorga, *Is U.S. Law Enforcement Stronger Than That of a Developing Country? The Case of Securities Fraud by Brazilian Corporations and Lessons for the Private and Public Enforcement Debate*, 54 COLUM. J.

changed after *Morrison* [between 2010 and 2016]. Let me walk you through the key findings.

First, there was an upward trend in issuer reporting violations. That was the majority of the actions. This finding is positive, and I will explain in a second why. Second, there was no identifiable trend in terms of anti-fraud enforcement. Third, trading suspensions and registration revocation orders were issued about three years—on average—after companies had stopped reporting by filing Forms 20-F, 40-F, 10-Q, or 10-K. Fourth, there is an increasing tendency to use administrative law judges, which is common in all [more recent] SEC enforcement. Foreign private issuers are no exception.

Fifth, average settlements are surprisingly stable, excluding a few very serious outliers. An example is British Petroleum and the explosion of their oil rig. Excluding those outliers, nothing has changed with respect to settlements. This was not the case for private class action settlements.⁴⁷

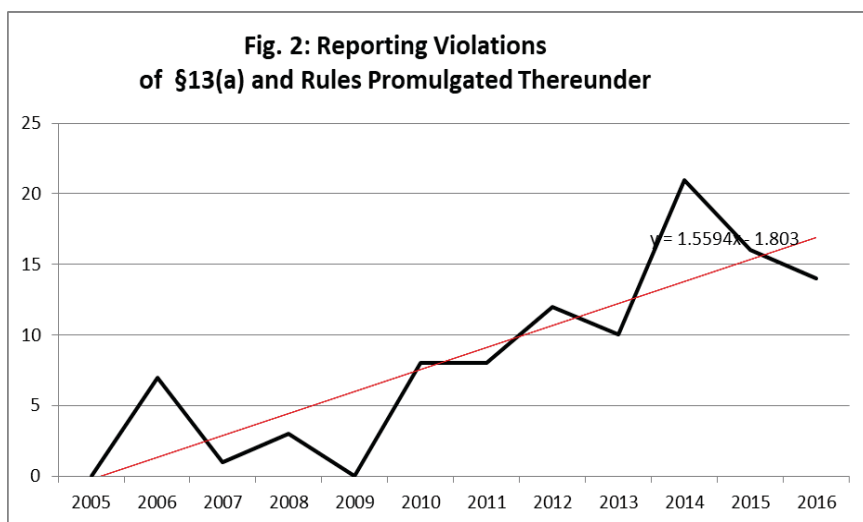
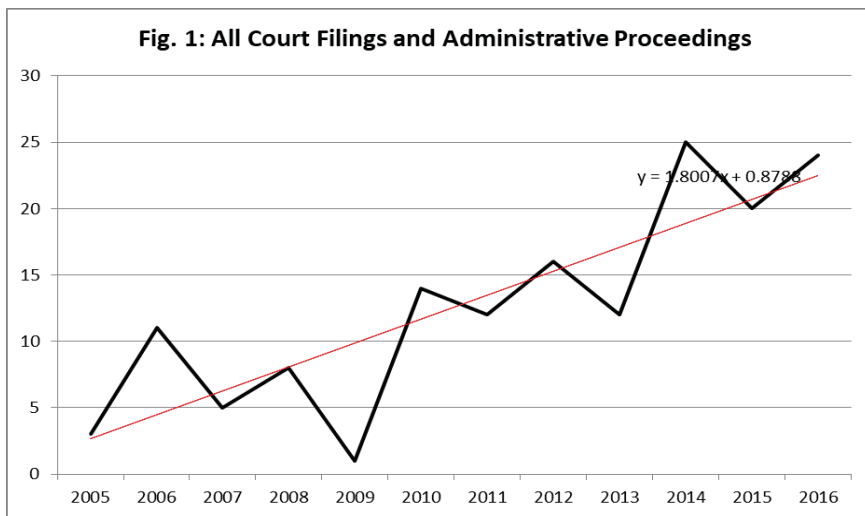
Finally, the SEC does seem to be filling the gap in private enforcement. As Jill Fisch's recent study and my previous study emphasize, it looks like private enforcers and the plaintiffs' bar do not go after small over-the-counter (OTC) companies. They prefer more visible targets, exchange-listed companies, etc. This is not the case for the SEC. Overall, however, the general conclusions are that nothing has changed for serious [anti-fraud] cases and that the traditional lenient approach is still there.

Let us look at this whole system in graphs. Although it appears that all filings went up, but this trend was driven primarily by reporting violations, specifically, simple reporting violations of Section 13(a).⁴⁸

TRANSNAT'L L. 603, 617–18, 687 (2016); Roger Silvers, The Effects of Cross-Border Cooperation on Enforcement and Earnings Attributes 15–16 (Oct. 4, 2017) (unpublished manuscript), <https://ssrn.com/abstract=3047913> [<https://perma.cc/ZLT6-YXMS>].

47. See Yuliya Guseva, *Extraterritoriality of Securities Law Redux: Litigation Five Years After Morrison v. National Australia Bank*, 2017 COLUM. BUS. L. REV. 199, 263–67, 271–73. But see Robert Bartlett, Matthew D. Cain, Jill E. Fisch, & Steven Davidoff Solomon, *The Myth of Morrison: Securities Fraud Litigation Against Foreign Issuers*, 74 BUS. LAW. 967 (2018–2019).

48. 15 U.S.C. § 78m (2012).



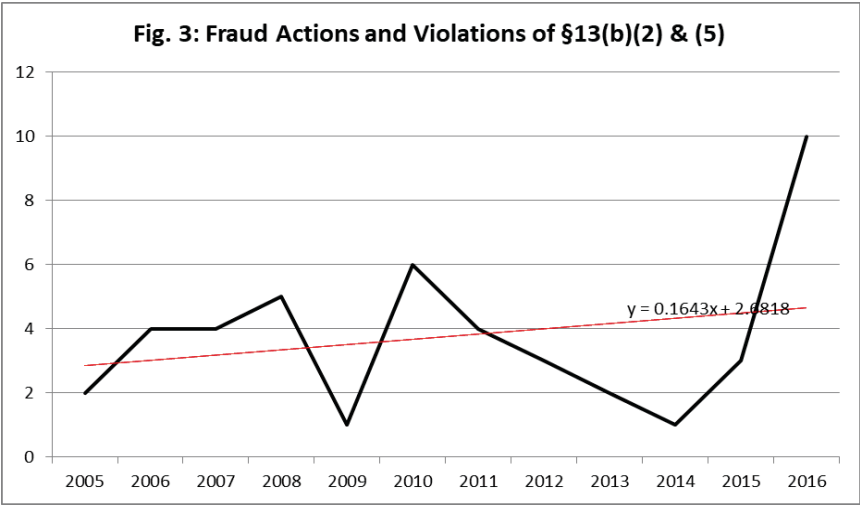
When it comes to more serious actions—violations of the anti-fraud provisions of the Securities Act of 1933⁴⁹ and the Exchange Act,⁵⁰ as well as the Foreign Corrupt Practices Act (FCPA), specifically, Sections 13(b)(2) and 13(b)(5)⁵¹—there is no clear trend, except that spike which marks 2015. [The spike] is mostly explained by FCPA violations and

49. 15 U.S.C. § 77q (2012).

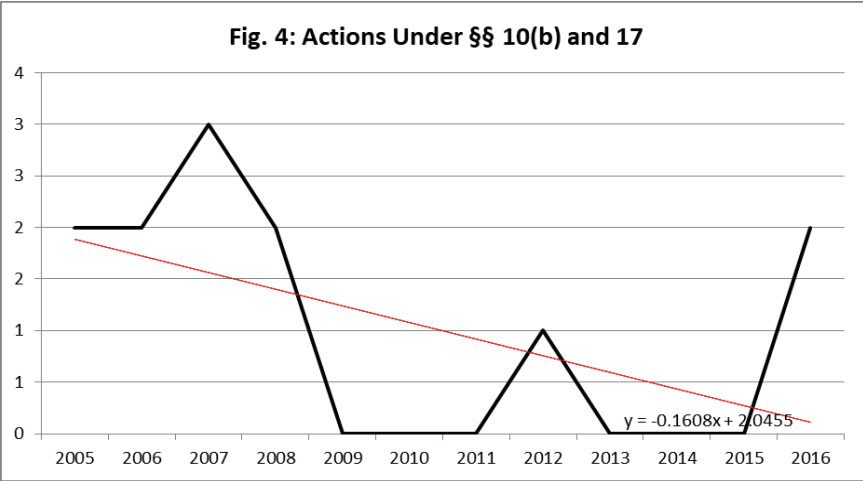
50. 15 U.S.C. § 78j(b) (2012).

51. 15 U.S.C. §§ 78m(b)(2),(5).

foreign bribery. That was one of the important aspects of the last years of Mary Jo White’s SEC.

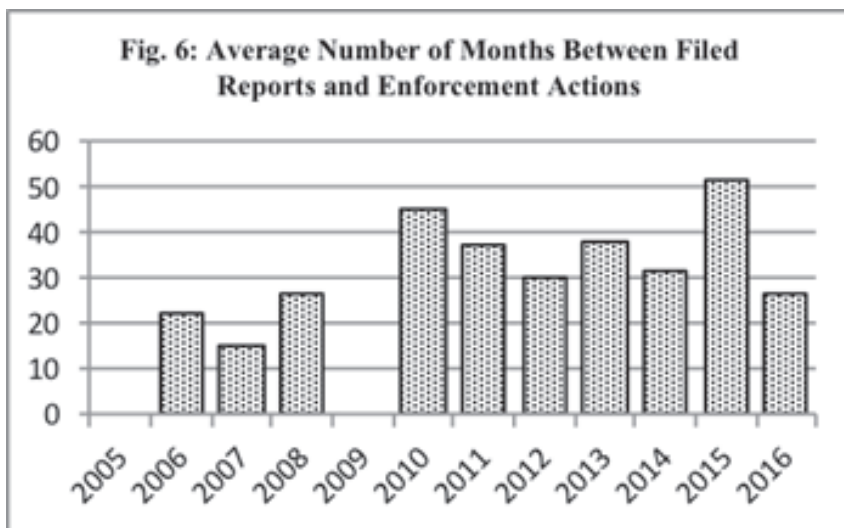


When we look at the focal points of *Morrison*—specifically, Section 10(b), to which I also added here Securities Act Section 17,⁵² which is the sister provision of Section 10(b) of the Exchange Act—there is no precise trend.



52. 15 U.S.C. § 77q.

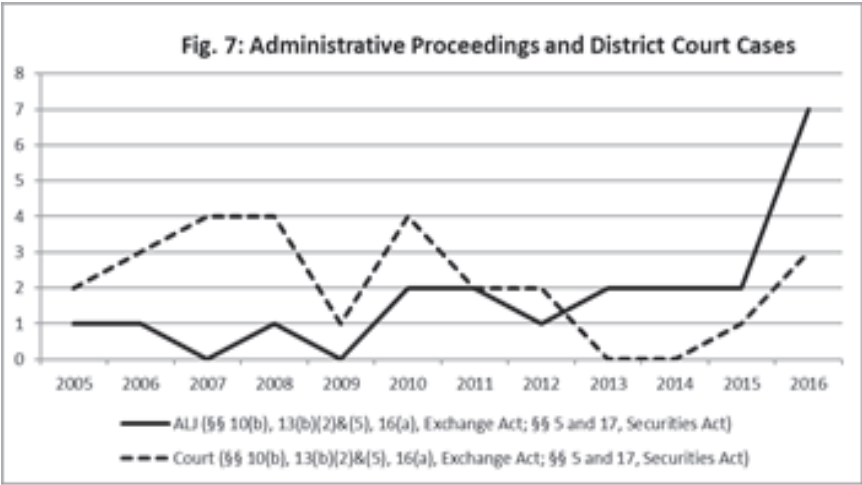
We can actually ignore this trend line completely because there are only a few cases brought for violations of Section 10(b) and Rule 10b-5. The next chart is more interesting.



Recall what I mentioned earlier: The SEC procrastinates before interdicting trading between willing buyers and sellers of securities, even though there is no current information about some companies for more than three years. Apparently, the SEC is acting in reliance on market gatekeepers, like broker-dealers. Most importantly, it looks like the SEC is playing catch-up.

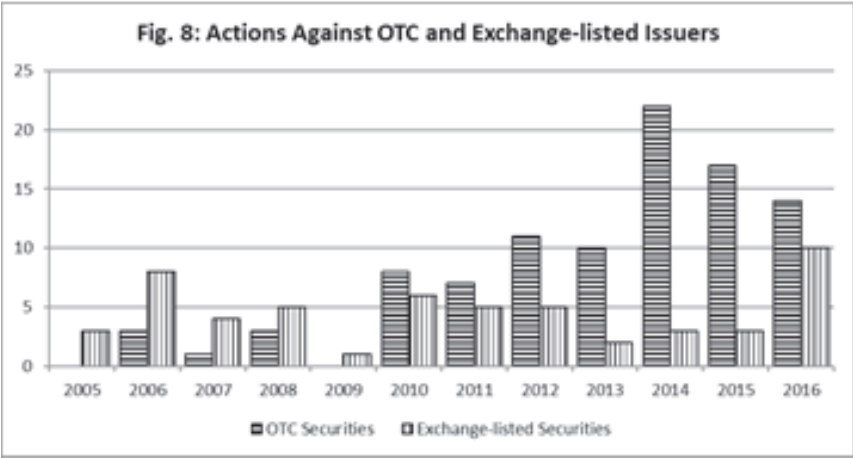
Remember that increase in Section 13(a) violations? Possibly, the SEC is playing catch-up, slowly revoking the registration of the securities of issuers delinquent in their filings. It takes a while. The upward trend is probably associated with [the recent] improvements in the Electronic Data Gathering, Analysis, and Retrieval system as well, but obviously not with *Morrison*.

A few other things are also not associated with *Morrison*. One is the SEC's preference for administrative law judges over federal courts, this solid line right here.



Obviously, it happened because of [the] Dodd-Frank [Wall Street Reform and Consumer Protection Act (Dodd-Frank)],⁵³ not *Morrison* per se. As we all know, Dodd-Frank has expanded the SEC’s authority to seek civil penalties in administrative proceedings.

The last finding is the gap-filling or complementarity function of the SEC.



53. 12 U.S.C. § 5301 *et seq.* (2010).

Ostensibly, the SEC does go after OTC issuers—the longer bars—a little bit more often than after exchange-listed issuers. For private litigation, this dynamic is reversed. However, what SEC enforcement actions are we talking about here? Simple revocations of the registration of securities, trading suspensions—that is about it. By contrast, these shorter bars—the exchange-listed issuers [in my database]—are usually slapped with larger fines, disgorgement, and higher civil penalties.

To conclude, I was unable to identify any changes in the traditional lenient approach of the SEC to foreign private issuers. Sorry, Pierre-Henri Conac, I just do not think that the SEC is there to enforce U.S. law against foreign issuers in all possible cases.

I also think that this low-key approach, in fact, is, using a game theory term, the “dominant strategy” of the SEC. Why? Because the Commission is economizing on its resources. The enforcement benefits would accrue to corporate governance in foreign markets and foreign jurisdictions. So, why would the SEC subsidize the rest of the world through extensive enforcement? In this sense, it is their dominant strategy.

At the same time, maybe *Morrison* did change something, and these are just a few limited examples. The reason is simple: there is so much ambiguity in the current literature. I know of at least four studies that came up with completely different results on whether *Morrison* was good—or bad—for private litigation and for share prices. But a few things are worthy of mention here.

First, we have more issuers from offshore jurisdictions. Their numbers have increased since 2009–2010. We have more class action filings, starting around 2008. More defendants settle quickly, and this is what I discovered in my previous study. Specifically, many defendants—and this is the new post-*Morrison* trend—do not even bother to file a motion to dismiss; they just settle. Perhaps, they do that because of risk aversion. In the alternative, maybe there is some kind of increase in fraud, which the SEC needs to consider in the future.

So, should the SEC ramp up enforcement against foreign issuers? No. However, considering that foreign jurisdictions are evolving, and that *Morrison* may have changed the status quo in private class action litigation, the SEC should introduce a more collaborative, informal approach eliciting cooperation from foreign firms, and develop more cooperation tools with foreign regulators.

Thank you very much.

MR. COSENZA: It is always an honor to be back here at Fordham. I am a very proud alumnus.

It is even more of an honor to be on the same panel as Professor Fisch, who taught me everything I need to know about securities regulation. I probably should have studied a bit more in your class, considering how I turned into being a securities litigator, but you were a tremendous professor, and I learned so much from you.

Professor Gelter, the book is great. I am a partner at a law firm, and it is sitting on my mantle. I deal with a lot of international securities class actions and securities regulation.

I am going to wrap this up with a little discussion about *Morrison* because I have a very personal connection to that case, but first I want to touch on a few things I am seeing in my practice in terms of foreign issuers and global securities regulation and litigation.

The first thing is we have heard a lot about the foreign countries and their enforcement being behind the United States. I have a few confidential matters I cannot really get into, but I will say what I am seeing is that foreign countries are on the bandwagon now.

I think there has been a bit of a slowdown from the SEC on enforcement, and I see a lot more foreign countries really taking issuers that are located in their jurisdictions to task, and the United States now being much more passive and participating in those investigations. So, I think we have seen a trend where, from a public enforcement perspective, more foreign governments are being more active in policing their own companies and problems that are going on within those companies.

Which then leads to a problem, which I am dealing with right now, and this is a “piling on” problem. Traditionally, you always would have the United States taking the lead in these sorts of matters, and, given what I just described to you, the United States is not taking the lead in a lot of these matters. If you have, particularly, a very significant international company, you have a number of jurisdictions basically fighting—assuming there is going to be a settlement in the offing—as to what their percentage should be and how they should take control.

They would describe the lead that they took in terms of the investigation, and basically how you should allocate settlement funds within different jurisdictions. That is becoming a real problem for us private practitioners because, obviously, once people see dollar signs, everyone is claiming how the fraud really occurred in their jurisdiction and they have a more significant interest in policing that company.

The dollar signs for some of these settlements are becoming much more significant. Once you have something in the “B” range—which is billions—you will have everyone chomping at the bit to jump in and threaten you with litigation and enforcement proceedings in their

jurisdiction unless they are allowed significant participation in the settlement. That is a real problem.

One thing I do want to know—and this is a resulting issue that is actually going to change based on Jay Clayton’s endeavors over the last few years—I think you are seeing less of a concern among foreign companies being listed in the United States or wanting to gain more access to the U.S. capital markets.

I was new at the time, but I do agree that the Sarbanes-Oxley changes spooked many senior executives of foreign companies. I had an Australian client at that time who basically said, “I have to get out of the United States,” because the idea that a senior executive relying on rollups of various reports and then having to certify that the financials are accurate could potentially be personally liable spooked him. Basically, there was a big movement to get out of the United States. But I am actually seeing that trend reverse itself, and again I think it is based on a lot of the initiatives from Jay Clayton, plus these other jurisdictions that they are currently domiciled in being much more active in enforcement. So, you are seeing that sort of change.

One other thing that is an important thing to note—and this is not even a U.S.-specific issue, but I think it is becoming an issue for all jurisdictions when you have these global securities regulation enforcement proceedings—is that self-reporting is becoming almost like you get a gold star, not only just from the United States and the SEC, but in terms of cooperating with foreign regulators. There are many opportunities for you to plead how the company was a victim in this. Those sorts of arguments, depending on your level of cooperation, typically only used to succeed in the United States to some degree, but are actually gaining a lot more traction with foreign regulators.

Those are very high points, and I want to wrap this up with a very personal story on *Morrison*.

I represented the Swiss reinsurance company named Converium in the early 2000s. I was a very anxious midlevel associate. This big securities case comes in, and I think, “Oh, is this something I would be interested in working in?” I answer, “Sure.”

I read the complaints, and I am offended about this in some degree. This is a Swiss reinsurance company. All the named investors here are predominantly European or Swiss and most of these folks bought their shares on the Swiss stock exchange.

I read this, and I go to the senior partner at the time and say, “How is this case in the United States? This should, typically, be either some *forum non conveniens* or a subject-matter jurisdiction-type defense.”

He basically said, “No. You need to read Judge Friendly’s decision from the early 1970s saying that if some of the underlying conduct took place here, they are allowed to have jurisdiction in the United States.”

I go read Judge Friendly’s decision, and I come back to the senior partner and say, “This still does not make any sense because the conduct that is actually at issue here is not where the fraud took place, but where the disclosures actually were issued from, and that actually took place here in Switzerland.” He said, “That is a good point. We will make that argument.” He did not think the Judge—it was Judge Koh at the time—was going to buy it. Judge Koh did not buy that argument on a motion to dismiss and sort of laughed at us.

In any event, while that case was pending, *National Australia Bank v. Morrison*—this is the tie-in to *Morrison*—was filed against National Australia Bank. Wachtell Lipton represented National Australia Bank, and I worked very closely with Wachtell Lipton in trying to figure out what to do with the *Morrison* case.

George Conway, before he became a famous tweeter, was a hell of a securities lawyer. He was the architect of the *Morrison* strategy—which, by the way, morphed by the time it got to the Supreme Court. He picked up on what we had done in *Converium* and refined it to some degree, and basically said: “Look, the disclosures at issue in *National Australia Bank* were based on a mortgage-originating company in Florida. Yes, that was a rampant fraud. Basically, who cares? Everything went up to the senior executives in Australia, and those are the folks who actually issued the disclosures.” A much savvier judge, Judge Jones, actually agreed with that argument, and that one then went up to the Second Circuit.

By the way, in the interim, after Judge Jones issued that ruling, we repackaged the same argument we had made in a motion to dismiss at class certification to Judge Koh, basically saying, “Look at what Judge Jones decided in *National Australia Bank*.”

At class certification, Judge Koh then agreed with us and excluded all the foreign investors from the class, which had the impact—I think Professor Fisch mentioned this—that basically 90 percent of the shareholders were foreign, and as a result of that, the plaintiffs’ case basically collapsed and we were able to settle for a very small amount.

I actually wanted to continue litigating the case because we were ahead of *National Australia Bank* and could have gotten our case to the Second Circuit and then potentially to the Supreme Court. Our client just

wanted to get out as quickly as possible and settled for a very small amount of money, all things being equal. I helped George Conway as he continued on and won his case in the Second Circuit and then changed his argument, to some degree, in the Supreme Court.

We celebrated *Morrison* when it came out as a bright-line test, like “This is end of these cases.” But, unfortunately, *Morrison* has not been a bright-line test, despite what I think Justice Scalia was trying to accomplish, and we are back in uncertain territory—there is a recent Second Circuit decision from Judge Sullivan—as courts are weighing the conduct and the allegations predominantly domestic or foreign. And then you have the *Toshiba* case.

So, we have basically gone twenty years and we are almost back to a position where there is again a circuit split as to whether or not this predominantly foreign test is the proper test, or whether there is a bright-line test, and whether or not *Toshiba* was actually accurately decided.

Thank you.

PROF. CONAC: I think we have something like five minutes for some questions.

QUESTION [Geoffrey Jarvis]: This is for Jill Fisch. While the history you just heard about *National Australia Bank* is quite true, there is an important aspect to it. The question in those cases was, how do you deal with the foreigners? In all of the cases up until *Morrison*, U.S. investors were presumed to be covered by 10(b) regardless of whether they bought stock anywhere. After *Morrison*, U.S. investors no longer had the protection of the U.S. securities laws.

In your view, how does the fact that we have cut U.S. investors—I mean they are getting solicited from overseas, all these communications that are causing them to buy UBS or Convergium or any other stock are coming from overseas into the United States, and they choose to buy on the foreign exchange—affect your paradigm on enforcement, that the U.S. investors no longer get the protection of U.S. law?

PROF. FISCH: First of all, I would just reiterate that this question feeds into an ongoing debate over the relative importance of compensation versus deterrence as the primary objective of securities enforcement. I would also note that to the extent there is viable litigation against these companies in the United States because their securities are traded in the United States, that litigation is going to generate at least some of the deterrent effect.

The other thing I would say is the U.S. market is kind of segmented when it comes to foreign securities. U.S. retail investors primarily invest

through ADRs, and the vast majority of those ADRs would support a claim after *Morrison* because they are listed and traded in the U.S. markets, and most courts have accepted that.

U.S. institutional investors, for a variety of reasons, often purchase their securities abroad. Bobby Bartlett did an empirical study after *Morrison* showing that *Morrison* did not really affect the willingness of institutional investors to purchase their securities outside the United States.⁵⁴

But one of the issues that I think the book and the discussion today point out is that institutional investors may well have recourse, and may increasingly have recourse, to compensation remedies outside of the United States. If that is true, then even the compensation objective of securities enforcement may be served.

I think that is a moving target. Some of the practices that we are talking about in terms of greater access for direct actions or arbitration are still evolving.

QUESTION [Prof. Fox]: I think Geoffrey Jarvis makes an interesting point, though, in the sense that if we are talking about a company that is traded on a U.S. exchange—so it is providing U.S. disclosure, it is a registered Exchange Act company—if only a little fraction of its shareholders can sue using fraud-on-the-market suits, here is a set of companies that are being traded in the United States. If you do take the investor perspective more seriously, yes, they can get compensation perhaps, but there is significantly less deterrence through the civil liability route.

Jill Fisch makes an appropriate point, but I think we ought to recognize here are people who have come to the U.S. market, and yet, their misstatements are not being deterred to the same extent.

PROF. CONAC: This is absolutely true as seen from the outside.

Maybe one question for Todd Cosenza from your perspective. From what I have seen in Europe, I think a case brought in the United States—either a private claim in New York or an SEC action—really brings terror to a lot of people. It is something people do not like, and this is also why I think it is good that the SEC still goes against foreign private issuers. What is your experience? What have you seen with clients when they come to you and say, “Okay, we are being sued in the United States, and we really do not like it”?

54. See Robert P. Bartlett III, *Do Institutional Investors Value the Rule 10b-5 Private Right of Action? Evidence from Investors' Trading Behavior Following Morrison v. National Australia Bank Ltd.*, 44 J. LEGAL STUD. 183 (2015).

MR. COSENZA: Very quickly, that is why I mentioned the point earlier. It is U.S.-based discovery that causes a lot of European clients to be just totally baffled, confused, angry, scared, some combination of all that, when you explain to them the process and how this will play out.

I have had arbitration-type cases for shareholders in European-based countries, and you get very quickly to the end, without looking at emails, looking at various correspondence, without the plaintiffs having an opportunity to digest what is the best part of their case.

So, I just think your comment, the deterrence—for especially European-based executives, they freak out when there is a U.S.-style litigation brought against them.

PROF. CONAC: Okay. That is good.

One last question?

PROF. FISCH: I have a question for Todd Cosenza, too. In light of what you just said, I wonder about Yuliya Guseva's finding that SEC enforcement is not really substituting for private enforcement and the extent to which, in your view, foreign issuers and foreign executives are concerned about an SEC action, and the extent to which they would view that as problematic as private litigation in the United States.

MR. COSENZA: That one is hard to say, Professor Fisch. I think different people have different reactions.

I think an SEC subpoena has significant deterrent effects, but there is almost a sense of, "We are dealing with the government; it is a cost of doing business"—they are scared—versus dealing with civil litigants, where they are like, "How is this possible?" I think that is the difference, but I think the deterrence is pretty much the same.

PROF. CONAC: If there are no more questions, I want to thank all the panelists.

MR. BRUNO: Thank you to all our panelists.

Since we are running a little bit behind, in order to save more time for our final speaker, we are going to skip the break in between here. If you have to run out, please do it quickly while we get set up, and we are going to get started right away. Thank you.

FIRESIDE CHAT

MR. BRUNO: For our keynote address, I would like to introduce Commissioner Elad Roisman. He was appointed by President Donald Trump to the SEC and was sworn into office on September 11, 2018.

Interviewing him will be our very own Professor Sean Griffith, who is the T. J. Maloney Chair in Business Law here at Fordham Law School.

PROF. GRIFFITH: Thank you, Mike. And thank you so much, Commissioner Roisman, for being here today with us. It is a pleasure to have you and a pleasure to have an opportunity to have this conversation.

COMM'R ROISMAN: Thank you for having me, and thank you, Mike, for the introduction, and to Fordham, for providing this opportunity. I am always excited to speak to law school students, and I am glad to see so many of you on a Friday afternoon. I am looking forward to what I am sure will be an interesting discussion on fiduciary duty and proxy voting.

Before I start, I think it would be helpful to give a little bit of background of how I ended up where I am.

But, before I even start that, I have a standard disclaimer, which I am sure many of you have heard multiple times: My remarks and views are my own; they do not necessarily reflect those of the SEC or the other Commissioners.

With that out of the way, let me share with you a bit about my background.

I started my career here in New York in private practice doing mergers and acquisitions and corporate work, which was incredibly interesting. Working with public companies, especially on things like their proxy statements, was something that I really dug into and found rewarding.

From there, I ended up working at the New York Stock Exchange, doing a lot of work in the trading and market space, but also with their listed public companies. I was the Assistant Corporate Secretary for most of the subsidiaries under the TopCo board. I worked with management and the board, drafting the public filings, including the 10-K and the proxy statement, and interacted with the board and management, observing how they worked.

From there, I got a call from someone I knew through private practice. He ended up being a Commissioner at the SEC. His name was Dan Gallagher. I remember this call vividly. He called and said, "Hey, how would you like to move to Washington, D.C., and be a counsel for me in Trading and Markets?"

I distinctly remember laughing. I said, “No. That is the last thing I want to do. Government is broken, I keep on telling you why your rules are terrible. Why would I want to leave private practice?”

In response, he said, “Why not put your money where your mouth is and come and try to fix some of it with me?”

After being able to somehow convince my wife to leave New York, we ended up going down there, and I worked for Dan for a year and a half. It was incredibly rewarding, and I learned a lot about the Commission.

Next, I ended up getting an open position on the Senate Banking Committee, which oversees the SEC and other financial regulators. I took a leap and ended up being the Securities Counsel on the Committee for two Chairmen, eventually becoming the Committee’s Chief Counsel.

That position entailed overseeing the financial regulators and also helping write legislation. I worked on a lot of legislation. Some of it became law, and it was really rewarding.

I have been at the Commission now for just over a year, and it has been surreal. Being a Commissioner is one of those things you do not—even if you have had prior experience being at the SEC—quite understand what it is like until you actually do it. Every day it is incredibly impressive to see how much the people who work there care about our markets and furthering the agency’s three-part mission of protecting investors; maintaining fair, orderly, and efficient markets; and facilitating capital formation.

We have an incredible depth of knowledge there, and one of the beauties of being a Commissioner is you can call people and ask, “Tell me about this.” It has been really helpful on matters that I really care about, including the proxy process.

Traditionally, the SEC has a very limited role in corporate governance, and frankly in shareholder voting, but we do have a role in proxy voting. One of the things that I appreciated in private practice is how complicated some of our plumbing underlying a lot of this voting is.

One of the things that we are trying to tackle now is whether there is a way for us to potentially simplify the current structure to ensure that when you vote, you are confident—and we are confident—that that vote is cast and accurately counted. Those are things that I think everyone takes for granted, but we are still going through the mechanisms to make sure that we understand them and whether things can be improved.

I think we will talk more about it, but as you probably have heard, the market for and the ownership structure of companies today are

fundamentally different than they were over the last several decades. Because of that, it has been interesting to see how participants have evolved, corporations have evolved, tacit owners have evolved, shareholders have evolved, and the level of engagement has evolved.

I think the SEC has a lot of these sorts of matters on our regulatory flexibility agenda. But it has been a fascinating time to look through the history and see how we ended up where we are.

PROF. GRIFFITH: I am so happy that you teed up the proxy issue because that is exactly what I was hoping we would talk about.

At the end of August, the SEC released some new Guidance on two topics, both of which were related to proxy voting.

First, the Commission provided Guidance on Investment Advisers' Voting Responsibilities.⁵⁵ Second, I believe on the same day, the Commission provided Guidance on the Applicability of Proxy Rules to Proxy Advisers.⁵⁶ I was wondering if we could talk about each of those, one at a time.

Could you walk us through or tell us a little bit about the Interpretive Guidance on Investment Advisers' Voting Responsibilities?

COMM'R ROISMAN: Sure. Getting back to something I touched upon earlier, if you look at the historical ownership of a corporation thirty or forty years ago, stock was primarily held by retail investors directly. Today most retail investors own shares indirectly through institutions. The SEC has recognized this shift over the last several decades.

The SEC adopted a rule in 2003 about proxy voting by investment advisers—a practice that the Commission saw that was important and only growing. The SEC indicated early on that there are fiduciary duties associated with how an investment adviser votes proxies on behalf of its clients. Subsequent to that Rule, there have been many discussions and indications from the Commission that this is an important obligation.

People had questions. In 2004, the SEC staff issued two No-Action Letters—the Egan-Jones⁵⁷ and the Institutional Shareholder Services

55. Commission Guidance Regarding Proxy Voting Responsibilities of Investment Advisers, 17 C.F.R. §§ 271, 276 (2018).

56. Commission Interpretation and Guidance Regarding the Applicability of the Proxy Rules to Proxy Voting Advice, 17 C.F.R. § 241 (2018).

57. See Egan-Jones, Inc., SEC No-Action Letter (May 27, 2004), withdrawn Sept. 13, 2018, <https://www.sec.gov/news/public-statement/statement-regarding-staff-proxy-advisory-letters> [<https://perma.cc/44D9-FKZ3>].

(ISS) letters⁵⁸—which allowed investment advisers to get comfortable in how they use proxy advisory firms to vote proxies on behalf of clients. One of the letters essentially said that if an investment adviser has a conflict of interest with respect to voting proxies, the adviser could cleanse its vote by relying on an independent third party to determine the way it should vote.

Subsequent to that, there were many roundtables talking about shareholder proposals and these issues. The SEC issued a concept release about proxy plumbing in 2010. We held roundtables. The staff issued a legal bulletin in 2014 addressing frequently asked questions about proxy voting. There have been congressional hearings. There have been General Accounting Office reports. This is an issue that comes up over and over.

What we did this past August was help clarify what the existing law and viewpoint of the SEC is. The timing is important because in June of 2019, we promulgated some Final Rules relating to the duties that financial professionals have to their customers. We adopted “Regulation Best Interest,”⁵⁹ which applies to brokers. We also adopted the Fiduciary Duty Interpretation,⁶⁰ which applies to investment advisers, where we talked about an investment adviser’s fiduciary duty to clients with respect to investing, but we explicitly carved out proxy voting.

In August, we did not create new law; we just gave a means for understanding what our expectations are. We basically said two things. They are, namely: (1) If you are an investment adviser, you have the ability to scope your relationship with your client to include or exclude voting proxies; and, (2) if you choose to include voting, you have a fiduciary duty to vote responsibly and in the best interest of your client.

What does that mean? There are two fiduciary duties that we typically talk about: the duty of care, which means you have to have some reasonable method to ensure that what you are doing is in the best interest of your client, and a duty of loyalty, which means you cannot put your interests ahead of your client.

58. See Institutional Shareholder Services, Inc., SEC No-Action Letter (Sept. 15, 2004), withdrawn Sept. 13, 2018, <https://www.sec.gov/news/public-statement/statement-regarding-staff-proxy-advisory-letters> [<https://perma.cc/7WDP-KQ4X>].

59. Regulation Best Interest, Exchange Act Release No. 34-86031 (June 5, 2019), <https://www.sec.gov/rules/final/2019/34-86031.pdf> [<https://perma.cc/8VLT-HQXR>].

60. Commission Interpretation Regarding Standard of Conduct for Investment Advisers, Advisers Act Release No. IA-5248 (June 5, 2019); <https://www.sec.gov/rules/interp/2019/ia-5248.pdf> [<https://perma.cc/UC4S-KQBE>].

What we did was, in a question-and-answer format—similar to the staff legal bulletin that was promulgated in 2014—we gave potential ways for investment advisers to help possibly address some of these issues. The examples provided are not meant to be dispositive; they are meant to be helpful.

If you take nothing else from this, I would say there is nothing I have seen that asset managers are doing that is not permitted by this Guidance, as long as it is fully and fairly disclosed to clients.

PROF. GRIFFITH: The way that I read that guidance, it basically says that the way in which an investment adviser designs their voting regime is contractual and they can design whatever mechanism with regard to voting with their investors they would prefer when they enter into the investment contract.

COMM’R ROISMAN: That is a great summation.

The key piece, I think, is you need to have informed consent. People need to understand what the investment adviser is actually taking on, and the client can make the determination of whether that is what they are looking for or not.

PROF. GRIFFITH: I am a big fan of private ordering arrangements of that type, in general, in the design of legal regimes.

But one issue that comes up among academics when they think about private ordering is the problem of “sticky defaults.” A sticky default is a default rule, which is to say a rule that the parties can change—so, in this context, a rule like how proxy voting works—but then it is sticky, meaning the parties have difficulty changing it because there are some barriers to changing it other than negotiating costs.

It strikes me that investment adviser voting is a paradigmatic sticky default because of the rational apathy problem—which we should probably talk about as the basis underlying this idea, that maybe advisers will be better at voting than individual shareholders because individual shareholders are rationally apathetic to their stakes. But if individual shareholders are rationally apathetic in voting when the time comes to vote, they are probably also rationally apathetic to voting in designing their choice set with regard to voting in the contractual regime.

So, if the default is sticky, it suggests a greater role maybe for the regulator in designing what the default rules ought to be. In other words, if you cannot trust the parties to necessarily select the arrangement that they would select optimally because of the stickiness, maybe there is a greater role for the regulator to nudge them toward an efficient allocation of voting.

I wonder if that question has ever come up at the Commission, or if you have any thoughts about the idea of whether the parties need a little bit more of a nudge than just the opportunity to contract.

COMM'R ROISMAN: It is interesting. I had not heard of sticky default—and this is probably my ignorance—before talking to you. [Laughter]

PROF. GRIFFITH: I did not make it up.

COMM'R ROISMAN: If you did, that is impressive.

What I will say is I think the way our system is set up is that we are more interested in the relationship between the adviser and the client and the fiduciary duty that binds them together.

One of the things I had not appreciated but actually appreciated more after reading your paper several months ago, was the fundamental difference between the fiduciary duty in the context of a corporation compared to that of a fund.⁶¹ In private practice, I had never really dealt with fiduciary duty with respect to funds, only corporations; for a corporation, the fiduciary duty is to the shareholder, and that is Delaware law, and that is sacrosanct. That is how I always viewed it.

My mind was a little bit blown when I learned about fiduciary duty as it relates to funds, which is that the investment adviser's fiduciary duty is to the fund itself; it is not to the fund's shareholders. That is a really, really important distinction because in many ways you could have individual shareholders' views that may not be for the benefit of the fund.

One of the things that is incredible about our ecosystem and our marketplace is the slew of choices of products for people to invest in and investment advisers that they could potentially hire, and one way that people can make that investment decision or choose to enter into that relationship is based on disclosure. So, if I buy an index fund that is supposed to track a large segment of the market, I do so in light of the disclosure that fund has provided, and for the most part I just assume, for example, that the objective of the fund is profit maximization.

Let us say it could be something else. What if I buy, for example, an environmental, social, and governance (ESG) fund? That is fine, but I need to understand what that fund's objective is.

61. Sean J. Griffith, *Opt-In Stewardship: Toward an Optimal Default Rule for Mutual Fund Voting*, 98 TEXAS L. REV. (forthcoming 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3404298 [<https://perma.cc/2BUJ-KXDZ>].

So, when I look at whose responsibility it is, how they are furthering the voting, it is whatever that stated objective is. If your stated objective is to track an index fund, I am presuming that your vote tries to align with that objective. Or, if there is some kind of other reason that I have bought a product for, whatever that objective, you need to replicate that. I think that is what has been incredible.

I think the role we have as a regulator is to ensure that that disclosure is adequate, so people understand what they are purchasing. If a fund adviser is saying something that does not actually correlate with how they are voting the fund's shares, then that is something that we need to step in and rectify.

I did not mean to sidestep your question. That is the way I view it.

PROF. GRIFFITH: That is a fascinating perspective. And I think that the set of problems around "what should we interpret the voting mandate of the investment adviser to be?" is interesting, especially where there is not additional disclosure about how the investment advisor plans to trade other concerns off against shareholder wealth-maximizing-related issues.

I will put a little bit more of a theory structure on this question and see if you have a reaction. Part of what the academic literature likes about mutual fund or institutional investor voting is that it is a solution to that rational apathy problem. Rational apathy is just that the individual investors do not have an incentive to invest in the acquisition of information or the processing of information or the resources to understand information. The information is there; they are just apathetic. But institutions have all those incentives because they are these big block holders.

So, what institutional investing really is, is a solution to an information problem because individual investors do not have that information and do not use it to their advantage in a way that corporate governance would suggest that they do.

But it also strikes me—and this is related to what you were just saying—that a lot of the things that we ask shareholders to vote on are not really information problems. Some are. For example, an activist approaches a company and says, "I think this company could be run more efficiently if it does *X*, *Y*, and *Z*", but the manager says, "No, that is wrong; we need to do *A*, *B*, and *C*," and they duke it out with slide decks that are disclosed in SEC filings. That is an information problem, right? That is an area where individual investors are rationally apathetic, and they are not going to learn that stuff, and we could rely upon institutions to do that.

But the other situation is the one that you were outlining, where there is some kind of an ESG proposal that comes in to a fund which does not

have a special mandate to focus on ESG issues. It seems like it is not really an information problem because ESG proposals or shareholder proposals are 500 words long; there is not really information about them, there is not really company-specific information about the effectiveness of that proposal on that particular company; and it seems more like an opportunity to demonstrate some kind of a commitment.

To come back to the question in a different way, should we think differently about those kinds of issues in the way that we design our default voting rules for investment advisers? Should we push toward an understanding where, unless you have separately disclosed a policy of voting a particular way on ESG, you do not vote on ESG, or you vote with management on ESG?

COMM'R ROISMAN: It is a really interesting question. The good news is, it always comes back to—let us talk about the fiduciary duty and the fact that you can construct the relationship in any way you want. I think that is where this issue could potentially be further delineated and addressed. If you are a fund and you are focused on tracking something or presumably value maximization, if pushed, I think you should probably make a disclosure upfront saying, “This is how we are going to deal with these types of scenarios”—at least that makes some inherent sense to me—“and these are the types of issues that we will think about.” I think it is difficult.

I am hoping that advisers are making decisions based on what they think is for the best interest of their client—the fund. I think it is interesting when advisers say they can have a uniform view about the same kind of issue, regardless of the company or the situation, which applies to every fund they manage. I am not sure that is always appropriate because the objectives of the fund should matter to this analysis.

But what I do think is, whatever is disclosed on what the objective of the fund or product is, I would find that it is the responsibility of the investment adviser to follow through and further that objective. So, for example, if it is an ESG fund, I would expect the adviser to vote in favor of more ESG proposals. You can still vote in favor of ESG proposals if you are not an ESG fund, but you have to, again, do it for the benefit of the fund. I think that is where it will be interesting to see—and maybe there is research out there—what is actually disclosed in the space for that and whether people have actually shown it to the funds to ensure accountability.

PROF. GRIFFITH: That is an interesting question.

Another way of doing this, it strikes me, is passing the votes through. You were mentioning in your preface about the “plumbing” of the proxy machinery and it is such an unwieldy and strange, arcane, dated world. But, if there was a technologically feasible way of passing the votes through to the beneficial owner, the person who has the interest and the economic return from the fund, would that be something that we should do; and, if we should, what is holding that up?

COMM’R ROISMAN: It is interesting. I have thought about pass-through voting for a while, just because people, like in your paper, have raised this issue.

What I keep coming back to, though, is the differentiation between the fiduciary duty for a corporation and for a fund. In the context of a fund, the duty is to the fund, not shareholders, and you could have shareholders with different viewpoints and no fiduciary duty or no real responsibility to the fund.

I could see it being interesting if that was possible. But the two things that immediately jump up to me are: (1) it is probably going to cost more for the adviser to do it; and (2) it may be a little difficult to figure out how you are going to allocate votes for that.

Let us just say, for example, you and I own the fund the same way. You have one preference; I have another preference. What are they going to do when it comes time to vote? Do they just look to our percentage of the entire fund? Do they try to do it pro-rata? Are we subsidizing other people’s votes with our votes? Those are some of the things that I think would be potentially problematic with pass-through voting.

That being said, you can contract the relationship however you want, and that may be appealing to some investors who want to say, “You know what? I want to retain this right” or who want to be able to say, “I feel strongly about this.” As long as it is disclosed and that is shaping the relationship, I think that makes sense.

But I think the key piece is we have—ideally, I would hope that people would make investment decisions based on whatever the disclosure is and, as long as that is clear, people can do that upfront. There is certainly innovation in this space, and I am hopeful that it will continue.

PROF. GRIFFITH: It strikes me that just mere pass-through voting would recreate the rational apathy problem, because if you imagine that you are a holder in something like the Vanguard 500 Fund, you would have 500 times whatever number of proposals it is, and if you are already not voting once, you are not voting thousands of times.

So, another way to think about doing that would be some kind of registration of your preferences at the time that you buy into the Vanguard

Fund, and you would say something on an online check-a-dot platform, like “Oh, I like the environment; I do not like guns.” Probably it would be more sophisticated than that, but it seems to me that this is the kind of thing that the new Investment Adviser Guidance would allow for. It is a kind of contractual environment that could be created.

COMM’R ROISMAN: I think you could do that. I think that is true. There could be room for this as a product. Again, in addition to, let us say, the pro-rata issue, one of the things that I think gives me a little pause is: how would you do it for—let us say you dislike one of the companies in the Vanguard 500 and you say, “I really want to vote ‘no’ on all management proposals for this one company; it is this kind of company that gives me a problem”—how are they going to carry out that vote for that one company as opposed to the other ones? Are you just saying, “I am focused on this company?” Or, if there is just a giant topic area—let us just say a separation of CEO and chairman of the board—how is the fund supposed to allocate that across all of its companies, because it is different on a case-by-case basis? It may make sense to have a separate CEO and chairman of the board at one company, but not at another. Again, we also have to remember that the adviser’s duty is to the fund, and not the shareholders in the fund. I think these are the types of questions that would need to be fleshed out a little bit more.

But, look, I truly believe that one of the things that is incredible about this marketplace is that people have discovered new products that have investor interest and appetite and, as long as it fits in with our system, people are able to craft adequate disclosure, and the fiduciary duty is upheld, I think it is great.

PROF. GRIFFITH: That is an interesting point that you make about how maybe you want to separate the chairman from the CEO in some companies, but not all companies, and ultimately, this winds up being a company-specific decision. So, if you had one of these electronic platforms for doing this, that would complicate things because you would basically be forced into a system where you are selecting one rule for all companies, which strikes me—I am with you on this—as a bad idea.

The trouble is that it seems like that is what the voting policies of these big funds presently do, right? They take a single position on things like having a staggered board, on things like separation of the chairman and CEO, and then they purport to apply them consistently. Whether they do or not in the voting is a separate question.

COMM’R ROISMAN: Having talked to many of these advisers about how they actually make their decisions, there is a lot of work that goes into it, and each one has a very different approach.

For instance, some of the large asset managers have stewardship teams, and they help drive voting policy and things like that. At some asset management firms, the stewardship team has the final say in how the fund votes; in other firms, the portfolio manager has the final word. But it seems to me that at a lot of firms, there is discussion about how to vote on particular matters.

One of the things that could potentially be problematic if there are no other potential remedial actions is uniform voting because, as I said, the adviser does have to do what is best for the client, which may be the fund itself. When you have kind of a “one size fits all” approach, it may subsidize one viewpoint. This might potentially simplify voting decisions for the adviser, but not necessarily do what is best for each fund.

That is just a general statement. As I said, I am not saying that any uniform voting practice that I have seen is a violation of our rules. But I think your point is an important one, which is what actually happens in the voting could be a little different than what these very general guidelines say.

PROF. GRIFFITH: Let me jump us forward to talk about the other Guidance that you all released on the same day, which was the one about proxy advisers. Could you please talk us through the big idea of that Guidance?

COMM’R ROISMAN: This is really an interpretation of what “solicitation” is, something we have regulated almost from our inception as an agency.

One of the questions we clarified is whether the proxy voting advice provided by proxy advisory firms is considered a solicitation under our rules. Our response was, generally, “Yes.” We went through a host of reasons why this advice could qualify as a solicitation: the fact that many of these firms market their expertise; they give out recommendations shortly before a vote; they give recommendations on the vote. All this gets to the question of: would the advice be viewed as a solicitation?

Some of the things that people initially conflated were (a) “Is that somehow a bad thing and illegal?” or (b) “Does that now put them in a box that they were not previously in?” The answer is that it does not because there have always been exemptions that proxy advisory firms rely on from the solicitation rules.

So, all we did was clarify and give more color of why we view this advice to be generally solicitations. Again, not anything new, no new rule, but just a rephrasing of things we have previously said.

PROF. GRIFFITH: Correct me if I am wrong, but it also clarified that, because it is a solicitation, the proxy advisers would therefore be subject to Rule 14a-9.⁶²

COMM'R ROISMAN: Yes. It is one of those things that even if you are exempt from the solicitation rules, you are going to be subject to the anti-fraud provisions of Rule 14a-9. That is because we always want investors to have material, complete, and full and accurate information, even if you are exempt from the rest of the solicitation rules. Again, that is something that has always been the case for any exemption under our rules.

PROF. GRIFFITH: Many of us in the room know professionally and socially Rob Jackson. When that Guidance was issued, Rob came out and said something like: "Well, the trouble is that this interpretation will increase costs on proxy advisory firms and, because the costs are raised on proxy advisory firms, those firms will raise their prices, which makes it harder for new entrants to come into the market and disrupt the business of the two dominant firms, ISS and Glass Lewis." What is your response to a critique like that?

COMM'R ROISMAN: I am glad Commissioner Jackson cares about costs and competition. I do, too. But my mission is to further the SEC's three-pronged mission, which is protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation. This interpretation is not new. Again, all we did was clarify what are solicitations, that they still have the ability to fit into the exemptions, and people have always been subject to anti-fraud liability for it.

So, I disagree, in the sense that it is not meant to be any kind of an impediment. People were going to be subject to anti-fraud liability if they were relying on any of these exemptions.

I will say that people have written a lot about the concentration of proxy advisory firms, and the current market concentration has been the same for a long period of time. I am not sure how us clarifying the law again is going to change any of that.

PROF. GRIFFITH: Right, it is certainly true that there was concentration in that industry long before the issuance of this Guidance.

62. 17 C.F.R. § 240.14a-9 (2011).

Since we are in a law school, I want to ask really big-picture, irresponsible questions. [Laughter]

COMM'R ROISMAN: Okay.

PROF. GRIFFITH: We are talking around the issue of the types of things that come up in shareholder voting. Some of our earlier conversation was, "There are some of these things are clearly wealth maximizing; and then there are some of these things that are not, and some of the things that are not come in under 14a-8."

Rule 14a-8⁶³ has been around since the 1940s, and the idea, I believe—I might get this wrong and please correct me—was that it was an opportunity to give shareholders some voice about the companies that they owned a piece of. The threshold, as we all know, are very low—it is \$2000.

Companies get these proposals year after year, repeatedly. They rarely pass. Even if they pass, they are usually precatory; companies do not have to do anything in response.

So, I am going to ask you: What do you think about this process? Is 14a-8 doing what it is supposed to do?

Maybe I will put a little bit more of a point on it: In light of the Twitterverse or YouTube, it seems like there are opportunities for shareholders to communicate. Do we need 14a-8?

In a lot of this debate that we were having about how we should think about what investment advisers do, we are forced into a pattern as a result of the types of proposals that come in under 14a-8. If we abolish 14a-8, does all this become easier?

COMM'R ROISMAN: Does anyone else want to take this one? [Laughter]

Obviously, 14a-8 has been around for a long period of time, and the history is actually really fascinating. Many have written about all of this.

The SEC has had a very limited role in corporate governance, and most of it has been through proxy voting. Voting is actually dictated by state law. Our mechanism for how to do it is a very small part of the laws governing shareholder voting.

But throughout history, there have always been limitations on the ability of shareholders to bring proposals at the cost of the company to other shareholders. One of the things that has been interesting is the conversation keeps on happening. We always have this debate. There have been countless proposals, roundtables, and petitions.

63. 17 C.F.R. § 240.14a-8 (2011).

Where I come out on it is, I think everyone can agree that owners should have a say in how a company is run, and this is a mechanism for them to do so. The thing that people often talk about is, “Are the current thresholds appropriate?” That is a constant conversation.

In 1998, the Commission raised the monetary threshold required to submit shareholder proposals. Previous to that, there were other types of limitations adopted, like allowing companies to omit the name and address of the shareholder-proponent to discourage the use of the rule by people motivated by a desire for publicity rather than the interests of the company and its shareholders. 14a-8 is one rule that I think is constantly evolving.

What I will say is—I do not want to prejudge it because we have it on our agenda at some point—I think it is always good when we hear from folks about whether the current system works or not. And I will say this: We have heard a lot. Some people say the current system works; some people say the current system does not work. It has been one of those things that, I think, there is adequate debate and I do not mind the Commission stepping in and saying, “Let us hear from you as well and see if we were to change it, how would we appropriately change it?”

But I do think there is and has been a role for Rule 14a-8. Whether it needs to be modified is something different.

The other thing people often talk about is how the current process for reviewing shareholder proposals brought pursuant to Rule 14a-8 is driven by the SEC staff. There are a lot of staff No-Action Letters that give color about whether the staff would recommend enforcement action against companies for excluding various proposals. For a long time, people have been asking whether that process should be modified or changed. I think it is a healthy debate.

So, I am not going to answer your question, but what I will say is I think this has been a debate for a long period of time and I think it is worthy for us to try to hear from folks to see whether the current parameters actually are appropriate.

PROF. GRIFFITH: Last question. This is an internationally themed conference organized around my colleague’s excellent book about global securities regulation.⁶⁴ We have been talking mostly about proxy voting, but there is a proxy voting question that I could ask that raises international themes.

64. GLOBAL SECURITIES LITIGATION AND ENFORCEMENT, *supra* note 1.

UN Principles for Responsible Investment

Principle 1: We will incorporate ESG issues into investment analysis and decision-making processes.

Principle 2: We will be active owners and incorporate ESG issues into our ownership policies and practices.

Principle 3: We will seek appropriate disclosure on ESG issues by the entities in which we invest.

Principle 4: We will promote acceptance and implementation of the Principles within the investment industry.

Principle 5: We will work together to enhance our effectiveness in implementing the Principles.

Principle 6: We will each report on our activities and progress towards implementing the Principles.

The United Nations has Principles for Responsible Investing (PRI)⁶⁵ and, as I am sure you know, what the PRI principally do is they say things about incorporating ESG goals into investment decisions, ownership practices, and voting practices. A lot of asset managers have signed on to the PRI and claim to incorporate those principles on the basis of something like fiduciary duty.

Since we are talking about fiduciary duty already, I would ask you if you would care to comment about the fiduciary duty that you think about—and you have talked many times about fiduciary duties between investment advisers and funds—in comparison with how you see those fiduciary duties and the way that the PRI see the fiduciary duties of asset managers.

COMM’R ROISMAN: I have seen these before. I will say when I remember reading them for the first time, they seemed more aspirational rather than compelling, in the sense that they are pretty broad. So, if you are an asset manager, I think you try to align it as much as you can; but if it compels the asset manager to act in a certain way, I think they have to be clear whether that furthers the best interest of that fund. I think that is a key piece.

65. *What are the Principles for Responsible Investment?*, PRINCIPLES FOR RESPONSIBLE INV., U.N. GLOB. COMPACT, <https://www.unpri.org/pri/an-introduction-to-responsible-investment/what-are-the-principles-for-responsible-investment> [https://perma.cc/6CMR-P38G].

It is interesting when you talk to folks about this how much of an impact it actually has. There are folks who think that asset managers are not doing enough, and I think there are folks who say that asset managers have built this into how their valuation model works or how their voting model works.

So, I would be concerned if they felt compelled to follow this over their fiduciary duty, but if they are able to justify, explain, and frankly disclose how they are doing it, then I think that would be sufficient.

But it is interesting. When folks signed up for the PRI, I am not sure they realized how much people would try to hold them accountable for what this means. The interesting part is, because it is written so broadly, it can mean different things to different investors and, frankly, to different asset managers.

PROF. GRIFFITH: I want to thank you so much, Commissioner Roisman.

I should have said at the very beginning of this that I am a big fan of the Tyler Cowen podcast. At the beginning of that podcast, he always says, "This is the conversation with my guest that I want to have, not that you want to have," and I very much have had the conversation that I want to have with Commissioner Roisman.

I know that you have a hard stop and we are right up against it. Would you be willing to take one or two questions from the folks here, just to make it an opportunity for someone else to raise a question?

COMM'R ROISMAN: Sure, yes.

PROF. GRIFFITH: Before the question, would you mind stating your name and your organization?

QUESTION: My name is David Sutcliffe and I am with Sports Technology. So, Mr. Commissioner, when you want to improve your golf game, you have to talk to me.

COMM'R ROISMAN: I would love to. I do not play, so go ahead.
[Laughter]

QUESTIONER [Mr. Sutcliffe]: There has been a lot of talk recently about loosening the banking regulations as we are getting closer to a recession in the United States. What are your thoughts about that?

COMM'R ROISMAN: Taking off my Commissioner hat because, very fortunately, I am not dealing with banking regulation during my current job, I think one of the beauties of the current system we have is it is subject to notice and comment, and if there is any kind of regulation that goes out there, we get comments before adoption. If it is something

new that is proposed, we will get comments to see whether the rule is appropriate to adopt or not.

I do not know much more about the recession probably than you do, except for what I read, but I think that as a regulator, the way I approach every kind of decision is: How am I helping carry out the mission of my agency but also protecting our economy and our citizens?

To the extent that there are any kinds of changes in the law or regulation, I hope, and expect frankly, that all of my fellow regulators have the same kind of viewpoint.

But I appreciate the conversation. I normally do not get to talk about my golf game or banking.

PROF. GRIFFITH: I want to make sure that you make it to your train, and I do not want to be the person who stands between all these people and cocktails.

COMM'R ROISMAN: I agree.

PROF. GRIFFITH: I want to thank you very much, Commissioner Roisman, for coming and being with us today.

COMM'R ROISMAN: Thank you. It is my pleasure.

MR. BRUNO: Thank you, Commissioner Roisman and Professor Griffith for a terrific discussion. Your insights and dialogue were incredibly interesting to both us students and all the guests here today.

Thank you again to all our panelists and guests for being here today. We appreciate you joining the *Journal of Corporate & Financial Law* and Fordham Law School for a great event.

As Professor Griffith stated, we have a cocktail reception next door that I hope you all will be able to stay with us for. Thank you.